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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,

and

NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Did the court below err in holding that citizen suits may be brought under the Clean Water Act seeking penalties for purely past violations, contrary to the holding of the Fifth Circuit in *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (1985)?

PARTIES TO THE PROCEEDINGS

Petitioner and defendant-appellant below Gwaltney of Smithfield, Ltd., is a wholly-owned subsidiary of Smithfield Foods, Inc.* Respondents and plaintiffs-appellees below are Chesapeake Bay Foundation, Inc., and Natural Resources Defense Council.

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* *Statement pursuant to Supreme Court Rule 28.1*: The Smithfield Packing Company, Incorporated, Patrick Cudahy Incorporated, and Schluderberg-Kurdle Co., Inc. ("Esskay"), are also subsidiaries of Smithfield Foods, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Gwaltney of Smithfield, Ltd., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on May 22, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 791 F.2d 304 and is reprinted in the appendix hereto ("App.") at 1a.

The opinion of the District Court for the Eastern District of Virginia (Merhige, J.) is reported at 611 F. Supp. 1542 and is reprinted at App. 26a.

JURISDICTION

Respondents brought suit in the District Court alleging jurisdiction under 33 U.S.C. § 1365. Petitioner filed a motion to dismiss for lack of subject matter jurisdiction, which was denied by the District Court on June 26, 1985. App. 26a.

Petitioner appealed, and the Court of Appeals affirmed on May 22, 1986. App. 75a. A timely-filed petition for rehearing was denied on June 26, 1986. App. 77a.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254 (1).

PERTINENT STATUTORY PROVISION

Section 505 of the Clean Water Act, 33 U.S.C. § 1365, provides in pertinent part:

> Citizen Suits
>
> (a) Authorization; jurisdiction
>
> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizen-

ship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

STATEMENT OF THE CASE

Petitioner Gwaltney of Smithfield, Ltd. ("Gwaltney"), operates a meat packing plant on the Pagan River near Smithfield, Virginia. Normal meat packing operations generate organic wastes that must be treated before discharge. The Virginia State Water Control Board issued Gwaltney a permit under the Clean Water Act, 33 U.S.C. § 1342, authorizing it to discharge treated effluent into the River.

Gwaltney's parent corporation, Smithfield Foods, Inc., acquired Gwaltney from ITT-Gwaltney on October 27, 1981. At that time Smithfield Foods received assurances from ITT-Gwaltney that previous difficulties with the wastewater treatment system at the plant had been identified and corrected. In fact, deficiencies in the system resulted in violations of the limits in Gwaltney's permit. As Gwaltney itself reported in its discharge monitoring reports, it exceeded the limits for fecal coliform/chlorine ("chlorine") and total Kjeldahl nitrogen ("TKN") on specified occasions between October 27, 1981, and May 15, 1984.

Gwaltney proceeded to correct the inherited flaws in its wastewater treatment system that had resulted in the violations of its permit. Within one year the chlorination system had been corrected, and since October 1982 there have been no further problems with chlorine.[1] Resolving

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[1] Chlorine levels were exceeded on isolated occasions during the winter of 1983-1984 due to the startup of Gwaltney's new, state-of-the-art wastewater treatment system. The District Court recognized that such violations were inevitable with the startup of such a system. App. 69a-70a.

the TKN problem proved more difficult, requiring a major redesign of the treatment facility. Gwaltney undertook this effort with full notice to and the continuing approval of the State Water Control Board. After delays beyond Gwaltney's control (including a six-month delay caused by the Board itself), Gwaltney's new system achieved designed efficiency levels, and the parties stipulated that the last violation of the TKN limit occurred on May 15, 1984.[2] In light of Gwaltney's efforts, the Board decided at its March 26, 1984, public meeting to take no action against Gwaltney for any past violations of the permit limits. At that proceeding the Board Chairman stated that "the violations at the moment, as I see the evidence, it seems to me that they are under control," and the staff member presenting the report on Gwaltney responded "[y]ou are right, they are now under control." Ct. App. Ex. Vol. at 425. As the Chairman concluded, "It just doesn't seem to me that it accomplishes anything from my point of view to take enforcement action for violations of standards that seem to have been not necessary at the outset." *Id.*

On June 15, 1984, however, respondents Chesapeake Bay Foundation and Natural Resources Defense Council filed suit against Gwaltney under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365.[3] The suit

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[2] A discharge monitoring report filed in October 1985—several months after judgment in the District Court—indicated an exceedence of the TKN limit at that time, an excusable "upset" caused by record flooding associated with Hurricane Gloria in September 1985. *See* 40 C.F.R. 122.41(n) (1985).

[3] The State Water Control Board was aware, at the time of the March 26, 1984 meeting, of respondents' intent to file suit. Indeed, the Board Chairman asked a representative of respondent Chesapeake Bay Foundation who attended the meeting "why ya'll are thinking about suing when it seems to me, we may incline toward not taking any action for past violations, from what I've heard." Ct. App. Ex. Vol. at 423-424. The Chairman stated, "Whatever we do, obviously ya'll can go ahead with your law suit, but that's a

was based on the permit violations reported by Gwaltney in its discharge monitoring reports. Although the citizen suit provision authorizes suit against any person "alleged to be in violation" of limitations in a permit issued under the Act, respondents stipulated that the last violation by Gwaltney occurred on May 15, 1984, a full month before the suit was filed. App. 6a n.7, 7a, 86a, 93a.

On June 26, 1985, the District Court issued an opinion assessing a penalty of some $1.3 million against Gwaltney. The District Court rejected Gwaltney's argument that the citizen suit provision was limited by its express terms, structure, and legislative history to actions brought to abate ongoing violations, and did not cover past violations. The District Court conceded that the recent decision of the Fifth Circuit in *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985), was "authority for [Gwaltney's] position," but the District Court "respectfully disagree[d]" with *Hamker* and declined to follow its holding. App. 39a-40a.

Gwaltney appealed, contending that the District Court erred in not following the ruling of the Fifth Circuit in *Hamker* that citizen suits could not be brought on the basis of past violations. The court below affirmed. It recognized that the "*Hamker* court refused to read 'to be in violation' as meaning 'to have violated,' stating that such an interpretation 'obviously strains the grammar of the statute and diverges from its ordinary meaning.'" App. 8a (quoting *Hamker*, 756 F.2d at 395). Like the District Court, however, the court below "respectfully disagree[d]" with the Fifth Circuit decision in *Hamker* and "decline[d] to follow it to the extent that it holds that section 505(a) of the Clean Water Act [33 U.S.C. § 1365

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much mor[e] cumbersome way of dealing with the problem." *Id.* at 424. In July 1984, after respondents filed the present suit, the Board initiated a protective enforcement action in state court that was voluntarily nonsuited after the decision of the District Court in this case.

(a)] does not permit citizen suits seeking civil penalties for past violations." App. 8a, 15a. The court below recognized that the Fifth Circuit in *Hamker* relied upon the decision of this Court in *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1 (1981). The court below dismissed statements in *Middlesex County* "that might be read as limiting the scope of citizen suits" as "mere dicta" that it declined to follow, adopting instead "an expansive reading of the jurisdictional grant" that it regarded as more consistent with "the importance of citizen suits as an enforcement tool." App. 16a, 12a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Directly Conflicts With the Decision of the Fifth Circuit in *Hamker*

The *Hamker* case, like the present case, involved an action under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365. Plaintiffs in *Hamker*, like respondents in this case, sought civil penalties for violations that occurred entirely in the past and had ceased by the time suit was filed. The plaintiffs in *Hamker* sought penalties for damage caused by a pipeline leak. The pipeline had been repaired and the leakage problem abated prior to the filing of the suit. 756 F.2d at 394. Respondents in this case sought penalties for permit limit violations. It was stipulated by the parties that the last such violations occurred a full month before the suit was filed. App. 6a n.7, 7a, 86a, 93a.

In holding that citizen suits may be brought under the Clean Water Act seeking civil penalties for violations that occurred entirely in the past and are not continuing, the court below expressly declined to follow the contrary holding of the Fifth Circuit in *Hamker*. In *Hamker*, the Fifth Circuit stated that "[t]he language of section 1365 and the structure of the Act convince us that a complaint brought under section 1365 must allege a violation occur-

ring at the time the complaint is filed." 756 F.2d at 395. In contrast, the court below held "that citizen suits like the one at bar, seeking civil penalties for permit violations committed entirely in the past, are permitted under section [1365]." App. 17a. This Court should grant the writ to resolve this direct and irreconcilable conflict in the interpretation of the jurisdictional provision of an important Federal statute.

A. *The Court Below and the Fifth Circuit in* Hamker *Adopted Directly Contrary Readings of the Language of the Citizen Suit Provision*

The pertinent section of the Clean Water Act provides that "any citizen may commence a civil action * * * against any person * * * who is alleged *to be in violation of*" a standard or limitation under the Act. 33 U.S.C. § 1365(a) (emphasis supplied). The Fifth Circuit in *Hamker* held that this statutory language must be read as written. "By its ordinary meaning the language of section 1365 requires an allegation of an ongoing violation." 756 F.2d at 395. Quite simply, if the violation alleged in the complaint ceased prior to suit, the defendant cannot be considered "to be in violation" at that time. Permitting citizen suits for purely past violations would require courts to rewrite the Act to provide for actions against any person alleged "to be *or to have been* in violation of" the Act. By its express and plain terms, the citizen suit provision is limited to ongoing violations that have not been abated by the time suit is filed.[4]

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[4] In a brief concurring opinion, Judge Williams noted that the opinion of the court in *Hamker* carried his "full concurrence." He wrote separately simply to indicate his view that the term "in violation" should be considered "broad enough to cover the chronic episodic violator or the violator who intentionally 'turns off the spigot' just before a citizen brings suit." 756 F.2d at 399. Such facts were not present in *Hamker* and are not present in this case. Gwaltney did not "turn off the spigot" just prior to the instant suit, but had undertaken the substantial modifications necessary

The court below, however, reached a conclusion directly contrary to the holding of *Hamker*. Where the *Hamker* court adhered to the ordinary meaning of the words chosen by Congress, the court below found the language of the citizen suit provision "ambiguous." According to the court below, "in violation" "can be read to comprehend unlawful conduct that occurred only prior to the filing of a lawsuit as well as unlawful conduct that continues into the present." App. 8a-9a. The court below therefore felt compelled to "look beyond the language itself" in reaching a conclusion opposite that of *Hamker*. App. 9a.

In relying on the plain language of the statute, the *Hamker* court adhered to the most basic canon of statutory interpretation. As this Court explained in *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980), "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *See Garcia* v. *United States*, 469 U.S. 70, 75 (1984); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). The decision of the *Hamker* court to read the citizen suit provision as written by Congress was in accord not only with this Court's general guidance on statutory interpretation, but with this Court's views on the particular statute at issue as well.

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to bring its newly-acquired wastewater treatment system into compliance many months before the suit was filed. Indeed, chlorine violations had basically ceased twenty months prior to suit. TKN violations ceased when the State Board authorized Gwaltney to proceed with the system it installed nine months prior to suit and weather conditions allowed the system to achieve design efficiency levels. The present case is thus hardly one in which a chronic violator "turns off the spigot" upon the filing of a citizen suit, but rather one in which a citizen plaintiff exhumed past violations by a permit holder that had achieved compliance with the Act.

In *Middlesex County Sewerage Authority* v. *National Sea Clammers Association, supra,* this Court recognized that the citizen suit provision "allows suits under the Act by private citizens, but authorizes only prospective relief * * *." 453 U.S. at 6.[5] Civil penalties for violations that have been abated before suit is filed obviously do not constitute "prospective relief." Accordingly, suits claiming civil penalties for totally abated actions cannot form the basis of an action under the citizen suit provision.

In *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), this Court emphasized the importance of adhering to the plain language of the very citizen suit provision at issue here. In that case, the Court rejected arguments that the language of a savings clause in the citizen suit provision should be read expansively to implement the purported intent of Congress. The Court emphasized that "[w]e * * * are inclined to view the [savings clause] as meaning what it says" and that "[w]e prefer to read the statute as written." *Id.* at 328, 329 n.22. That is precisely the approach adopted by the Fifth Circuit in *Hamker* and rejected by the court below.

The plain language reading of the citizen suit provision in *Middlesex County* and *Hamker* has also been adopted by the Seventh Circuit in *City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980). In that case the court noted that the citizen suit provision

> authorizes a civil action against a party "alleged to be in violation" of effluent standards or limitations prescribed under the Act or an order of the Administrator or a state with responsibility under the Act. *It does not provide for suits against parties*

[5] The Court in *Middlesex County* held that no private right of action should be implied under the Clean Water Act, and that no action could be maintained under 42 U.S.C. § 1983 for violation of the Act. 453 U.S. at 18, 21.

> *alleged to have violated an effluent standard or limitation in the past* or for recovery of damages. [*Id.* at 1014 (emphasis added).]

The Fifth Circuit in *Hamker* relied upon the decisions both of this Court in *Middlesex County* and of the Seventh Circuit in *City of Evansville* in concluding that reading the phrase "to be in violation" to mean "to have violated" "strains the grammar of the statute and diverges from its ordinary meaning." 756 F.2d at 395.

B. *The Court Below and the Fifth Circuit in* Hamker *Adopted Contrary Views of the Role of the Citizen Suit Provision in the Clean Water Act*

In support of their respective interpretations of the language of the citizen suit provision, the court below and the Fifth Circuit in *Hamker* also embraced fundamentally different views of the role of the citizen suit provision in the statutory scheme of the Clean Water Act. The *Hamker* court correctly recognized that "[p]rimary enforcement responsibility under the Act lies with the states and the Administrator." 756 F.2d at 395. Under the Act, States "desiring to administer their own permit programs must demonstrate that state officials possess adequate authority to abate violations through civil or criminal penalties or other means of enforcement." *Middlesex County*, 453 U.S. at 13. The Commonwealth of Virginia met these standards in the State Water Control Law, which authorizes the State Water Control Board to require regulated companies like Gwaltney to furnish information and submit to investigation. Va. Code §§ 62.1-44.15, .16, .20 & .21. The Board may issue administrative orders and rules, obtain injunctions and other orders in court, and impose civil penalties for purely past violations. *Id.* §§ 62.1-44.15, .23 & .32. As noted, Gwaltney kept the Board fully informed of the Company's plans, participated in all public meetings on the status of its work, and received Board approval of its actions.

The Clean Water Act also grants a broad array of enforcement powers to the Federal Government. The Administrator of the Environmental Protection Agency (EPA) is authorized to issue compliance orders to any person found to be in violation of statutory or permit conditions, including conditions for which no citizen suits are authorized. 33 U.S.C. § 1319(a). The Administrator may also respond to violations by bringing suit, and a court in such a case may impose appropriate civil penalties. *Id.* § 1319(b), (d). The Act also authorizes criminal prosecution in suitable cases. *Id.* § 1319(c). *See Middlesex County*, 453 U.S. at 13.

Congress "supplemented" this broad array of enforcement authority granted to the States and the Federal Government by also authorizing citizen suits of a "limited nature." *Id.* at 14, 17 n.27. The limited supplemental nature of citizen suits is clear from the terms of the Act. Before initiating a citizen suit, prospective plaintiffs must give notice to the Administrator, the State, and the alleged violator. When government officials respond by filing suit, the citizen action is barred. 33 U.S.C. § 1365(b). Similarly, as explained by the court in *Hamker*, "it is most reasonable to read the requirement that notice also be given to the alleged violator as an indication that where the violator responds to the notice by bringing himself into compliance, the citizen loses the right to bring suit under 1365(a), just as he loses the right to commence an action where the Administrator or the state responds by diligently prosecuting an action against the alleged violator * * *." 756 F.2d at 396.

The court below took an approach directly contrary to that of the Fifth Circuit in *Hamker*. Rather than viewing the citizen suit provision as a limited supplement to the broad and comprehensive array of enforcement powers granted to the States and the EPA, the court below ruled that "an expansive reading" of the citizen suit provision was necessary to effectuate the policies under-

lying the Act. App. 12a. The court noted that the separate section of the Clean Water Act authorizing suit by the Administrator of EPA, 33 U.S.C. § 1319(a)(1), contains language similar to that of the citizen suit provision. Assuming that the Administrator could seek penalties for past violations that have been abated, the court concluded that citizens must have the same right, since they must possess the same authority as the Administrator. According to the court below, "[i]t can hardly be questioned that the EPA has authority to bring suit for civil penalties for purely past violations," and "the scope of citizen enforcement powers must, in this important respect, be viewed as co-extensive with the enforcement powers of the EPA." App. 10a.

One of the premises of this syllogism is incorrect, the other is not necessarily true, and the conclusion, even assuming the validity of the premises, is a non-sequitur. First, the language of the provision authorizing suit by the Administrator is significantly different from the language of the citizen suit provision. The Administrator may issue a compliance order or bring suit when he "*finds* that any person is in violation" of the Act. 33 U.S.C. § 1319(a)(1) (emphasis supplied). Such findings at a point prior to suit may support jurisdiction even if the violation ceases before suit. The citizen suit provision, on the other hand, authorizes suit against any person "alleged to be in violation" of the Act, with no provision for jurisdiction premised on prior "findings." 33 U.S.C. § 1365(a)(1).[6] Second, it is by no means established that the Administrator may obtain penalties for purely past violations, as the court below assumed.

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[6] It is significant that the United States agrees that "the jurisdictional provisions pertaining to citizen suits need not, and indeed should not, be construed in tandem with the governmental enforcement provisions." Brief for the United States as Amicus Curiae Supporting Appellants at 20, *Sierra Club* v. *Shell Oil Co.*, Nos. 85-3753, 85-3762, 85-3763 (5th Cir.) (appeal pending).

That question is not presented in this case and need not be decided.[7]

Finally, even if the statutory language is considered similar, and even if EPA is considered to have the power to impose civil penalties for purely past violations, there simply is no basis for concluding that citizens must have the identical enforcement power. As the court in *Hamker* noted, the citizen suit "section obviously does not permit the citizen to *duplicate* the Administrator's powers * * *." 756 F.2d at 395 (emphasis in original). While the court below ruled that the authority of citizens to sue for penalties for past violations must be the same as the authority of the Administrator, the *Hamker* court properly recognized that such a parallelism was entirely inconsistent with the supplemental and subordinate role of citizen suits in the statutory scheme:

> Thus, although we do not decide an issue not before us, the Administrator may have the power to seek some redress for past violations, but this is no reason to waive the statutory requirement that *citizens* must allege that the defendant is "in violation" of an

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[7] The court below cited four cases for the proposition that the Administrator could seek penalties for purely past violations. *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979), and *United States* v. *Detrex Chemical Industries, Inc.*, 393 F. Supp. 735 (N.D. Ohio 1975), simply decided that the Administrator could simultaneously pursue administrative compliance orders and court actions for penalties. The cases did not specifically address the question of the Administrator's authority to seek penalties for past violations. The other two cases, *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 617 F. Supp. 1190 (D. N.J. 1985), and *Student Public Interest Research Group* v. *Monsanto Co.*, 600 F. Supp. 1474 (D. N.J. 1985), did not even involve actions by the Administrator.

It should be emphasized that the State, which has primary enforcement responsibility in this case, clearly *does* have the power to seek penalties for purely past violations. Va. Code § 62.1-44.15(8c) (Supp. 1985) ("the Board may proceed directly under [its civil penalty powers] for any past violation").

effluent standard, limitation or order. [756 F.2d at 395 (emphasis in original).]

The court below embraced an "expansive reading" of the citizen suit provision because of its view that "a significant deterrent would be lost if citizen suits seeking civil penalties for past violations were not permitted." App. 12a, 10a. It was the view of Congress, however, that the policies of the Act could best be implemented by vesting primary enforcement responsibility in the States and the Administrator, with only a supplementary role for citizen suits of a "limited nature." *Middlesex County*, 453 U.S. at 17 n.27. One of the express limitations on citizen suits is that they can be brought only against a person "in violation" of the Act. The court below erred in overriding the plain language adopted by Congress because of the court's view that another approach—reading "to be in violation" as "to have violated"—would better effectuate the policies of the Act. Congress enacts statutes, not policies, and a court is not free to ignore the former to implement the latter.

The court below sought support for its strained reading of the statute by noting that the citizen suit provision expressly authorizes a court in an appropriate case to order that civil penalties be paid to the Government. App. 12a. This argument is classic bootstrapping. The fact that the statute permits a court to order civil penalties for violations *when a case is properly within its jurisdiction* does not mean that a case involving only past violations is therefore properly within the court's jurisdiction. The court itself was compelled to recognize that "[t]here is some merit to [the] argument" that its logic confused the question of jurisdiction with the question of what penalties were available once jurisdiction attached. App. 12a n.11. Indeed, this Court in *Middlesex County* expressly recognized that civil penalties were permitted under the citizen suit provision, 453 U.S. at 14 n.25, yet

nonetheless described that provision as authorizing "only prospective relief" and authorizing "private persons to sue for injunctions to enforce" the Act. *Id.* at 6, 14. These statements are easily reconciled when it is recognized that there is no jurisdiction for a citizen suit unless the suit concerns an ongoing violation—hence this Court's focus on the "prospective relief" authorized by the provision—but that once such a suit is before a court it may order civil penalties. As the *Hamker* court noted, "[t]he section 'authorizes only prospective relief' even though 'civil penalties * * * may be ordered by the court.'" 756 F.2d at 396 (quoting *Middlesex County*, 453 U.S. at 6, 14 n.25).

Although it did not rely on legislative materials, the court in *Hamker* noted that "the legislative history supports our decision * * *." 756 F.2d at 395 n.1. The legislative history of the citizen suit provision does indeed demonstrate that Congress authorized citizen suits to be brought only to abate ongoing violations of the Clean Water Act. The Senate Report, for example, repeatedly refers to citizen suits in the context of abating violations. *See* S. Rep. No. 414, 92d Cong., 1st Sess. (1971) at 81 ("citizen suits seeking abatement"), 80 (citizens may file actions when government authorities do not take action to abate violations), 81 (attorneys' fees awardable to citizen plaintiffs "in actions which result in successful abatement"). The hearing record also repeatedly reflects the understanding that citizen suits were authorized only when necessary to abate an ongoing violation that either the State or EPA has not taken action to abate.[8] As this Court itself recognized in *Middlesex*

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[8] *See, e.g., Water Pollution Control Legislation, Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 1st Sess. (1971) at 114 ("Any person may sue a polluter to abate a violation") (staff analysis), 707 (citizen suits "are brought for the purpose of abating pollution") (Sen. Eagleton); *Water Pollution Control Legislation—1971 (H.R. 11896, H.R. 11895), Hearings Before the House Comm. on Public*

County, the citizen suit provision in the Clean Water Act "was expressly modeled on the parallel provision of the Clean Air Act," and "the legislative history of the latter Act contains explicit indications that private enforcement suits were intended to be limited to the injunctive relief expressly provided for." 453 U.S. at 18 n.27.[9]

Again, the court below disagreed with the Fifth Circuit in *Hamker*, concluding that "the legislative history does not conclusively support either side's position, but to the extent it speaks to the jurisdictional issue before us, we conclude that it favors the plaintiffs." App. 13a. The court below disregarded the foregoing legislative history in favor of a stray comment by one legislator in a written statement inserted into the Congressional Record. Although Senator Muskie did state that a citizen may bring an action against a person "who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one," 118 Cong. Rec. 33700 (1972), "[t]he short answer is that Congress did not write the statute that way." *United*

Works, 92d Cong., 1st Sess. (1971) at 369 ("retain for [citizens] the ultimate power to move against that willful polluter") (testimony of Stephen Saltzman, Washington Representative, Trout Unlimited), 439 ("[a] citizen's suit provision permits the citizen to * * * provide with his own resources what is in essence a public benefit, namely, stopping pollution") (testimony of David R. Zwick, Project Director, Nader Pollution Control Study Project).

[9] The court below dismissed the significance of this parallel by noting that the Clean Air Act citizen suit provision only permits suits for injunctions. *See* App. 14a n.12. The fact that penalties may be awarded under the Clean Water Act in a suit properly brought to abate an ongoing violation, while they may not be awarded under the Clean Air Act, does nothing to diminish the force of the parallel drawn by this Court in *Middlesex County*. The purpose of the citizen suit provision in both the Clean Air Act and the Clean Water Act is to abate violations, and the authorization of penalties in the Clean Water Act cannot be read to alter that purpose and permit citizen suits when the violation has already been abated.

States v. *Naftalin*, 441 U.S. 768, 773 (1979). On the contrary, the statutory language actually adopted by Congress limited citizen suits to those against a person "who is alleged to be in violation of" the Act. 33 U.S.C. § 1365(a). Senator Muskie's written insert is the only item in the voluminous legislative history that departs from the abatement purpose expressed throughout the legislative materials. It provides an excellent example of why, as this Court has repeatedly emphasized, courts should not rely on such remarks, particularly "one isolated remark by a single Senator," in seeking to discern legislative intent. *Weinberger* v. *Rossi*, 456 U.S. 25, 35 (1982). This is particularly true when the stray remark is directly contrary to the plain language of the statute and every other indicia of intent in the legislative history.[10]

The Fifth Circuit in *Hamker*, again relying on this Court's opinion in *Middlesex County*, recognized that expanding the citizen suit provision to embrace suits for past violations would directly undermine the intent of Congress to limit the burden on the Federal courts. In *Middlesex County*, this Court recognized that the citizen suit provision in the Clean Air Act—the model for the

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[10] The court below considered itself justified in ascribing talismanic significance to the comments of a single legislator because the legislator was Senator Muskie, sponsor of the Clean Water Act. App. 14a n.13. As this Court has often noted, however, "[t]he contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history." *Weinberger* v. *Rossi*, 456 U.S. at 35 n.15. *See Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. at 118; *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979). This rule applies with no less force to Senator Muskie's comments on the Clean Water Act. *See Milwaukee* v. *Illinois*, 451 U.S. at 331 n.23 ("the *dissent* attaches great weight to the views of Senator Muskie") (emphasis supplied). Indeed, as two commentators have noted, Senator Muskie's "enthusiasm may explain his expansion of the statutory language." Schwartz & Hackett, Citizen Suits Against Private Industry Under the Clean Water Act, 17 Natural Resources Lawyer 327, 348 (1984).

provision at issue in this case—was defended against the charge that it "'may burden the courts unduly'" on the ground that it offered "'no hope of financial gain and the very real prospect of financial loss'" for the citizen plaintiff. 453 U.S. at 18 n.27 (quoting 116 Cong. Rec. 33104 (1970) (remarks of Sen. Hart)). Expanding the scope of the citizen suit provision to include suits for purely past violations would provide a concrete financial incentive for citizen suits in Federal court. As the *Hamker* court explained:

> If section 1365 were interpreted as permitting citizen suits for civil penalties for past violations, all state damage claims which could be brought under pendent jurisdiction could be litigated in a federal forum, thus undermining congressional intent to limit the burden on the district courts. Since the Act provides for awards of attorney's fees and expenses, there would be a substantial incentive to bring suit under the Act rather than in state court. [756 F.2d at 396.]

Again, the court below was not persuaded by the reasoning of the Fifth Circuit. The court conceded that the concern of the *Hamker* court was "a real one," but dismissed it by noting that District Courts could avoid the problem by being "wary" in their exercise of pendent jurisdiction. App. 17a.

C. *The Decision of the Fifth Circuit in* Hamker *and of the Fourth Circuit Below Cannot Be Reconciled*

The court below clearly recognized that its decision created a conflict with the Fifth Circuit, going so far as to devote a section of its opinion to "The *Hamker* Decision." App. 15a. The court began that section by suggesting that "it could be argued that *Hamker* is distinguishable" because no permit was involved in *Hamker* and because *Hamker* concerned "only a single long-past and non-recurring discharge." App. 15a. The fact that the present case involves permit violations while *Hamker* involved violations of the Act is a distinction without a

difference. The citizen suit provision authorizes suits against persons in violation of "an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a)(1)(A). "[T]his chapter" refers to the Clean Water Act, and the effluent standards or limitations may be set in a permit issued under the Act, as in this case, or in the Act itself, as in *Hamker*. *See* 33 U.S.C. § 1365(f). There is simply nothing about the source of the limitation allegedly violated that can in any way reconcile the contrary jurisdictional holdings of the Fourth and Fifth Circuits.[11]

Nor can *Hamker* be distinguished as involving only a "single discharge." The discharge in *Hamker* lasted two weeks. 765 F.2d at 394. Each day of a violation such as the one involved in *Hamker* is a separate violation under the Act, and accordingly *Hamker* involved some 14 violations of the Act. For that matter, the present case can also be viewed as involving only a "single discharge" —the regular discharge of treated effluent from the Gwaltney plant into the Pagan River while repair of the system was underway. Under the Act that discharge resulted in several discrete violations, but that is equally true of the discharge at issue in *Hamker*. The important point is that in both *Hamker* and the present case any violations of the Act were abated prior to commencement of the citizen suit. In *Hamker* the past violations were held insufficient to satisfy the jurisdictional requirements of the citizen suit provision; in this case the past violations were held to satisfy those same requirements. The court in *Hamker* in no way rested its decision on the nature or number of incidents of the discharge, but solely on the fact that it was a past violation.

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[11] District Courts in the Fifth Circuit have applied *Hamker* to cases in which the alleged violation was of a permit limitation. *See, e.g., Sierra Club* v. *Copolymer Rubber and Chemical Corp.*, 621 F. Supp. 1013 (M.D. La. 1985), *app. pending*, No. 85-3763 (5th Cir.).

The court below also explicitly declined to adopt an approach urged by the United States as *amicus curiae* as a means of sustaining jurisdiction in the case at bar without rejecting the rationale in *Hamker*. The United States has affirmed that it "believes that *Hamker* correctly interpreted Section 505 [33 U.S.C. § 1365]" and that citizen plaintiffs cannot bring "penalty-only actions against violators who have attained compliance before suit is filed." Brief for the United States as Amicus Curiae Supporting Appellants at 16 n.10, 25 n.17, *Sierra Club* v. *Shell Oil Co.*, Nos. 85-3753, 85-3762, 85-3763 (5th Cir.) (appeal pending). The Government, however, reads *Hamker* broadly as permitting citizen suits on the basis of mere allegations of continuing violations, and suggested that jurisdiction could be sustained in this case because respondents alleged a continuing violation, even if the stipulated facts demonstrated that no such violation existed when the suit was filed.

The court below declined to accept this theory, and expressly did *not* decide whether any allegations of continuing violation by respondents were made in good faith:

> Because we hold that the Clean Water Act confers on the district court jurisdiction over citizen suits seeking civil penalties for past violations, we need not decide whether plaintiffs in this case made their allegations of continuing violations in good faith. • • • [S]uch an allegation is not required for jurisdiction to lie. [App. 7a-8a n.9.]

Nor would the Government's theory succeed in reconciling the two cases, even if it had been accepted. Respondents' allegations that Gwaltney constituted "a threat to continue its violations," App. 7a n.9, were no different from plaintiffs' allegations in *Hamker* that the defendant continued to operate its pipeline in a manner that would result in future violations of the Act. *See* 756 F.2d at 394, 397-398. In both cases the allegations were to the

effect that violations of the Act may occur in the future.[12] As the court noted in *Hamker*, the allegation that the conduct that resulted in the discharge "persists" was not "sufficient to satisfy the section 1365 requirement that the defendant be alleged to be in violation of an effluent standard, limitation, or order." *Id.* at 397. Thus, the Government's theory is not a means of reconciling the two cases, and, in any event, the court below expressly declined to accept that theory.[13]

Recognizing that the foregoing were not plausible reasons for distinguishing the *Hamker* decision, the court below expressly "decline[d] to follow" *Hamker*, "disagree[d] that the 'ordinary meaning' of the statute requires the adoption of the rule espoused in *Hamker*," and noted that "we find the reliance by the *Hamker* court

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[12] In *Hamker* plaintiffs alleged negligent operation of the pipeline as a basis for fear of future violations of the Act. The court correctly noted that the Act did not incorporate a negligence standard, 756 F.2d at 397, but the allegation of a threat of future violations *of the Act* was present in *Hamker* as in the case at bar.

Respondents in the present case alleged that Gwaltney violated its permit after February 29, 1984—the date of respondents' notice letter—as evidenced by discharge monitoring reports attached to respondents' complaint, which was filed on June 15, 1984. Those reports did not indicate violations occurring at the time suit was filed, respondents did not allege such violations, and indeed respondents stipulated that the last permit violation occurred one month prior to suit. App. 7a, 86a, 93a.

[13] The Government's theory is unsound as a matter of law. The requirement in the citizen suit provision that the defendant be "alleged to be in violation" is a jurisdictional requirement. When the factual basis for a jurisdictional allegation—other than the amount in controversy—is challenged, jurisdiction must be proved. *See Land* v. *Dollar*, 330 U.S. 731, 735 & n.4 (1947). Here, of course, the parties *stipulated* that the last violation occurred before suit was filed. Indeed, District Courts applying *Hamker* have not read it—as the Government would—to permit jurisdiction on the basis of mere allegations. *See, e.g., Sierra Club* v. *Copolymer Rubber and Chemical Corp.*, 621 F. Supp. at 1015.

• • • on the Supreme Court's opinion in *Middlesex* to be misplaced." App. 15a, 16a. As the court below recognized, both the holding and logic of its opinion were in direct and irreconcilable conflict with the holding and logic of the Fifth Circuit in *Hamker*. In its brief below the United States acknowledged that "several courts have addressed the issue of jurisdiction over past violations, and two conflicting approaches are emerging." Br. at 14. With the decision below, the conflicting approaches have crystallized, epitomized by *Hamker* on the one hand and the present case on the other.

II. The Question Over Which the Fourth and Fifth Circuits Have Split Is Important and Recurring

The present conflict among the Circuits on the jurisdictional prerequisites for a citizen suit under the Clean Water Act is particularly troubling in light of the prevalence of such suits. The Senate Committee on Environment and Public Works noted recently that "[i]n the past two years, the number of citizen suits to enforce NPDES permits has surged so that such suits now constitute a substantial portion of all enforcement actions filed in Federal court under this Act." S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985). Since 1983 alone over 400 notices of intent to sue have been filed by citizen plaintiffs.[14] In light of this large volume of litigation, it is not surprising that the precise issue on which the Fourth and Fifth Circuits have split has arisen with great frequency.[15]

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[14] EPA compiles and maintains a log of citizen suit notices. *See also* Schwartz & Hackett, 17 Natural Resources Lawyer at 327. This is the only notice that must be filed with the Government. No notice that litigation has actually commenced is required. *See* 33 U.S.C. § 1365(b).

[15] *See, e.g., Atlantic States Legal Foundation* v. *Al Tech Specialty Steel Corp.*, 635 F. Supp. 284, 286-287 (N.D.N.Y. 1986); *Connecticut Fund for the Environment* v. *Job Plating Co.*, 623 F. Supp. 207, 213-214 (D. Conn. 1985); *Sierra Club* v. *Copolymer Rub-*

The decision of the court below will doubtless precipitate an even greater increase in the volume of citizen suits. As of January 1984, some 65,000 permits had been issued under the Clean Water Act. Hearings on Implementation of the Federal Clean Water Act Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation, 98th Cong., 2d Sess. 4-5 (March 7, 1984) (statement of Hugh J. Wessinger, General Accounting Office). Violations of effluent limits in those permits must be reported by the permit holders themselves in discharge monitoring reports, which are required by law to be made available to the public. 33 U.S.C. § 1318; 40 C.F.R. § 122.41(l)(4). The reports are generally sufficient to establish a violation of the Act. *See United States* v. *Ward*, 448 U.S. 242 (1980). As the Act is interpreted in the Fourth Circuit, then, "any citizen" with standing need only look up the discharge monitoring reports of any one of the thousands

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ber and Chemical Corp., 621 F. Supp. at 1014-15 (four consolidated cases); *Friends of the Earth* v. *Facet Enterprises, Inc.*, 618 F. Supp. 532, 535 (W.D.N.Y. 1984); *Sierra Club* v. *Simkins Industries, Inc.*, 617 F. Supp. 1120, 1126-27 (D. Md. 1985); *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 617 F. Supp. at 1194-95; *Student Public Interest Research Group* v. *Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1425-26 (D.N.J. 1985); *Student Public Interest Research Group* v. *Monsanto Co.*, 600 F. Supp. at 1476-77; *Sierra Club* v. *Aluminum Company of America*, 585 F. Supp. 842, 853-854 (N.D.N.Y. 1984); *Student Public Interest Group* v. *National Starch and Chemical Corp.*, 23 Env't Rep. Cas. (BNA) 1982, 1984 (D.N.J. 1985); *Sierra Club* v. *Kerr-McGee Corp.*, 23 Env't Rep. Cas. (BNA) 1685, 1689-90 (W.D. La. 1985); *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 22 Env't Rep. Cas. (BNA) 1999, 2000 (D.R.I. 1985); *Sierra Club* v. *Raytheon Co.*, 22 Env't Rep. Cas. (BNA) 1050, 1054-55 (D. Mass. 1984); *Student Public Interest Research Group* v. *Anchor Thread Co.*, 22 Env't Rep. Cas. (BNA) 1150, 1154 (D.N.J. 1984); *Sierra Club* v. *Tosco Corp.*, 22 Env't Rep. Cas. (BNA) 2117 (N.D. Cal. 1984); *Sierra Club* v. *Monochem*, No. 84-147B (M.D. La. 1985), *app. pending*, No. 85-3762 (5th Cir.); *Sierra Club* v. *Shell Oil*, No. 84-3583 (E.D. La. 1986), *app. pending*, No. 85-3753 (5th Cir.); *Friends of the Earth* v. *Archer Daniels Midland Co.*, No. 84-CV-413 (N.D.N.Y. 1986).

of permit holders, find a violation—no matter how isolated, no matter how old—and file suit, with every confidence of prevailing and recovering all attorneys' fees and expenses.[16]

Under the rule announced below, any violation at any time in any one of over 65,000 permits can form the basis of a suit by any citizen, seeking penalties of up to $10,000 per day.[17] The plaintiff's case is essentially made by the defendant himself in the discharge monitoring reports. Citizen plaintiffs thus have little to lose and much to gain simply by flipping through old discharge monitoring reports. And, as noted by the *Hamker* court, there is a strong incentive for plaintiffs to append state law damage claims to their citizen suits, thereby covering their attorneys' fees and expenses on those claims as well.[18]

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[16] Since the plain language of the statute does not authorize citizen suits for purely past violations, and since Congress did not intend to authorize such suits, it is not surprising that the citizen suit provision contains no statute of limitations. Courts that have misread the statute to permit citizen suits for purely past violations have been compelled to struggle with the vexing issue of finding an appropriate limitations period to "borrow" for such litigation, with widely divergent results. Some courts have gone so far as to hold that there is *no* limitations period for citizen suits. *See Student Public Interest Research Group* v. *P.D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074, 1083-85 (D.N.J. 1986). Others have borrowed the five-year limitations period in Federal law for civil penalty actions, *see Sierra Club* v. *Simkins Industries, Inc.*, 617 F. Supp. at 1124-25, while still others have borrowed limitations periods from state law. *See Sierra Club* v. *Chevron U.S.A., Inc.*, No. CV85-1851 (C.D. Cal., Jan. 14, 1986), *app. pending*, No. 86-6287 (9th Cir.).

[17] This result is particularly troubling in view of the holding below—which we believe to be erroneous but which is not challenged here—that a violation of a single monthly limit constitutes thirty violations instead of one, resulting in a maximum penalty of $300,000 rather than $10,000. *See* App. 18a-22a.

[18] The holding of the court below also increases the danger of another incentive to suit wholly inconsistent with the objectives of the Act. Penalties under the Act are payable to the United States

The holding of the court below will also disserve the objectives of the Clean Water Act by permitting citizen suits to interfere with the primary enforcement responsibilities of States and the EPA under the Act. There is no doubt that Congress intended citizen suits to supplement government efforts to abate pollution, and indeed to spur government action when necessary to stop pollution. Congress did not, however, intend to permit citizens to exhume purely past violations, and bring penalty actions on the basis of such violations. Such suits do not help abate pollution—by definition, the problem already has been abated. Instead, they actually interfere with government efforts to promote prompt compliance with the Act.

One of the objectives of EPA's enforcement policy is the swift resolution of environmental problems. EPA Civil Penalty Policy, Env't Rep. (BNA) (Fed. Laws) 41:2991 (February 16, 1984). To serve this objective, EPA has established a formal policy that it "will consider reducing the gravity component of the penalty for settlements in which the violator already has instituted expeditious remedies to the identified violations prior to the commencement of litigation." *Id.* at 2993. If citizens could exhume past violations years later, however, and sue for maximum penalties, the incentive underlying this pol-

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Treasury, not to citizen plaintiffs. The prospect of large penalties, however, can be used as leverage to obtain a settlement directly benefitting the citizen plaintiff. It is common knowledge in the industry, for example, that many defendants in these suits settle the claims against them by making contributions to the plaintiff groups bringing suit or to projects sponsored by those groups. *See* Schwartz & Hackett, 17 Natural Resources Lawyer at 359. The United States recognized that this is a serious problem in the *amicus* brief it filed below. *See* Br. at 26 n.18 ("parties to a private enforcement action could attempt to circumvent the court's penalty assessment and unjustly enrich the plaintiffs at the expense of the Treasury"). The Government goes so far as to argue that "courts should subject any settlements to some form of public notice and comment similar in effect to those used by the government." *Id.* The seriousness of the problem, however, could be mitigated simply

icy would completely evaporate.[19] The strained reading of the statute permitting such suits thus undermines the goal of the Clean Water Act. That goal, after all, was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251 (a), not to restore and maintain the environmental litigation bar.

The citizen suit provision essentially vests prosecutorial functions in private citizens. Private citizens, however, unlike state or Federal authorities, are not accountable to the electorate. Serious constitutional questions would be presented if the decision below were permitted to stand.[20] Congress has on limited occasions expressly authorized private citizens to seek penalties payable to the United States for purely past violations. *See, e.g.*, 31 U.S.C. § 3730. Congress knows how to authorize such actions if it wants to, and, in light of the serious questions surrounding such suits, they should not be implied in the absence of express authorization.[21] The citizen

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by adhering to the language of the statute and not permitting citizens to seek penalties for purely past violations.

[19] Only a formal consent order issued in Federal court would bar subsequent citizen suits. *See Student Public Interest Research Group* v. *Georgia-Pacific Corp.*, 615 F. Supp. at 1432. A consent order issued in a state administrative proceeding would *not* have such an effect. *See Friends of the Earth* v. *Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985).

[20] In the case of an ongoing violation, either the State or EPA can bring suit after notice from the citizen plaintiff, and such action precludes the citizen suit. In the case of purely past violations that the governmental authorities have decided do not warrant court action, however, there would appear to be no mechanism by which the State or EPA could sue to *prevent* penalties being imposed. The State or EPA could hardly sue for the purpose of obtaining no relief.

[21] One reason such actions seeking penalties for purely past violations should not be implied is that when Congress has authorized such suits, it has taken care to enact express safeguards against the problem of settlements benefitting the private plaintiffs at the expense of the United States. *See id.* § 3730(b)(1) (citizen suit

suit provision should be interpreted—as it was by the Fifth Circuit in *Hamker*—to avoid these serious questions, particularly since such an interpretation is compelled by the plain language of the statute and supported by the legislative history.

In the Fourth Circuit, citizen suits may be brought under the Clean Water Act for purely past violations. In the Fifth Circuit, they may not. This Court should grant the writ to resolve this direct and irreconcilable conflict on an important and recurring question of Federal law.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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seeking penalties for false claims "may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting"); *United States* v. *Eicher*, 56 F. Supp. 972, 973 (D.D.C. 1944) (intent of quoted language was "to discourage private compromise settlements"). *See* note 18, *supra*.

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-1873

CHESAPEAKE BAY FOUNDATION, INC.;
NATURAL RESOURCES DEFENSE,
Appellees,

versus

GWALTNEY OF SMITHFIELD, LTD.,
Appellant,

UNITED STATES OF AMERICA,
Amicus Curiae,

ATLANTIC STATES LEGAL FOUNDATION, CONNECTICUT FUND FOR THE ENVIRONMENT, FRIENDS OF THE EARTH, SIERRA CLUB, and STUDENT PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY,
Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., District Judge. (C/A 84-366-R)

Argued: February 4, 1986 Decided: May 22, 1986

Before WINTER, Chief Judge,, and RUSSELL and SPROUSE, Circuit Judges.

Patrick M. Raher (David J. Hayes; Catherine J. LaCroix; Hogan & Hartson; Anthony F. Troy; George A. Somerville; Mays, Valentine, Davenport & Moore on brief) for Appellant; James Thornton, Natural Resources

Defense Council, Inc., and Jeter M. Watson, Chesapeake Bay Foundation, Inc. for Appellees; Joseph E. Lees, Department of Justice (F. Henry Habicht II, Assistant Attorney General; Nancy B. Firestone and David C. Shilton, Department of Justice; Glenn Unterberger; Elizabeth Ojala, Office of Enforcement and Compliance Monitoring, Environmental Protection Agency; Bruce J. Terris, Nathalie V. Black on brief) for Amicus Curiae.

WINTER, Chief Judge:

Plaintiffs Chesapeake Bay Foundation ("CBF") and National Resources Defense Council ("NRDC") filed a "citizen suit" under section 505 of the Clean Water Act, 33 U.S.C. § 1365, against defendant Gwaltney of Smithfield, Inc. ("Gwaltney"), alleging violations of the pollutant effluent limits contained in Gwaltney's National Pollutant Discharge Elimination System ("NPDES") permit, issued pursuant to section 402 of the Act, 33 U.S.C. § 1342. The district court granted plaintiffs' motion for partial summary judgment on the issue of liability and held a hearing to determine the amount of the civil penalty to be assessed against Gwaltney pursuant to section 309(d) of the Act, 33 U.S.C. § 1319(d). Several months later, Gwaltney filed a motion to dismiss for lack of subject matter jurisdiction, alleging that it had ceased violating its permit *prior* to plaintiff's filing suit. Gwaltney argued that citizen suits for purely past violations are not permitted under the Act, and that for jurisdiction to lie, the Act requires a defendant to be violating the Act at the time suit is filed.[1]

The district court denied the motion to dismiss, holding that citizen suit jurisdiction could lie in the absence of an ongoing violation. It also ruled that Gwaltney was

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[1] Gwaltney also argued that CBF and NRDC lacked standing to bring this lawsuit. The district court rejected this contention, and Gwaltney does not appeal from this aspect of its ruling.

liable for a maximum civil penalty[2] of $6,660,000, but, in view of a variety of factors, adjusted the penalty downward to $1,285,322.[3] Gwaltney appeals, and we affirm.

I.

Plaintiffs are nonprofit corporations dedicated to protecting natural resources. CBF is a regional environmental group with over 19,000 members residing in the Chesapeake Bay area, and NRDC a nationwide environmental group with over 800 of its members residing in Virginia. Gwaltney is a subsidiary of Smithfield Foods, Inc., and is engaged in the business of processing and packing pork products. Smithfield Foods had acquired the Gwaltney plant, which is situated on, and discharges wastewater into, the Pagan River near Smithfield, Virginia, from the ITT-Continental Baking Co. Gwaltney assumed responsibility for wastewater discharge under the NPDES permit as of October 27, 1981; although numerous violations of the permit occurred before that date, only those violations occurring afterward are the subject of this lawsuit.

Jurisdiction over this citizen suit was grounded on Section 505(a) of the Act, 33 U.S.C. § 1365(a), which permits any citizen to commence a civil action against any person alleged to be in violation of an effluent standard or limitation under the Act, in order to enforce the limitation and/or to assess civil penalties for its viola-

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[2] Civil penalties under the Act are payable to the U.S. Treasury, and are to be distinguished from private civil *damages*, awarded to a plaintiff. Such damages are very clearly not permitted by the Act. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

[3] The district court's opinion is reported at 611 F. Supp. 1542 (E.D. Va. 1985).

tion.[4] The suit was filed more than sixty days after plaintiffs, in compliance with section 505(b)(1)(A) of the Act, 33 U.S.C. § 1365(b)(1)(A), had given Gwaltney, the Environmental Protection Agency ("EPA") and the Virginia State Water Control Board notice of Gwaltney's violations and of the plaintiffs' intent to file suit.

The violations involved in this case (the responsibility for which is not at issue on appeal) are repeated dis-

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[4] This section of the Act, in its entirety, provides:

Citizen Suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

Section 1319(d) of title 33 (section 309(d) of the Act) provides:

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

charges in excess of Gwaltney's NPDES permit limits for a number of pollutants.[5] That permit fixed both daily and "monthly average" limits for certain named pollutants. The most significant pollutants were chlorine (Cl_2), for which the last violation occurred in October 1982, and total Kjeldahl nitrogen (TKN), for which the last violation occurred on May 15, 1984. The latter was the last recorded violation for any pollutant and occurred approximately one month before this suit was filed. These violations were reported by Gwaltney itself, as required by law, *see* 33 U.S.C. § 1318(a)(3)(A); 40 C.F.R. § 122.41(l)(4), in its discharge monitoring reports (DMR's).

Many of the excessive discharges were violations of daily limits for the various pollutants. Others were violations of "monthly average" limits for which measurements are made on the basis of a limited number of samples taken during the month, according to the terms of the NPDES permit.[6] For purposes of assessing civil penalties under 33 U.S.C. § 1319(d), which provides for a maximum penalty of $10,000 *per day* of a permit violation, the district court treated each monthly average violation as if it were a series of daily violations, one for each day of the month in question. Thus the court found monthly average violations to have occurred in twenty-two different months, for a total of 653 days of

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[5] The pollutants are: fecal coliform; chlorine (Cl_2); total suspended solids (TSS); total Kjeldahl nitrogen (TKN); and oil and grease.

[6] The daily discharge limitations in Gwaltney's permit are generally twice as high as the monthly average limitations. *See* 611 F. Supp. at 1552 n.11. This is in apparent recognition of the fact that environmental damage can occur both from large, discrete discharges of pollutants, and from discharges of lower average volume occurring over the long term. *See id.* at 1553.

violation.[7] In addition, the district court assessed penalties for thirteen violations of daily pollutant limits, giving a grand total of 666 days of violation,[8] and a potential maximum penalty of $6,660,000. It then adjusted downward the penalties actually to be imposed and fixed an aggregate penalty of $1,285,322. In making the adjustment, the district court, with the agreement of the parties, used as a guideline the EPA's Civil Penalty Policy, 41 Env't Rep. (BNA) 2991 (Feb. 16, 1984). In accordance with EPA's policy, the court considered such factors as economic benefit derived by Gwaltney from noncompliance, a "gravity" component based on the seriousness of the particular violation, and unwarranted delays in compliance.

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[7] Because the parties stipulated that the last recorded violation occurred on May 15, 1984, the month of May was treated as having only fifteen days for penalty assessment purposes. The total days of violation resulting from the twenty-two violations of monthly averages was therefore 653 instead of 669. *See* 611 F. Supp. at 1555 n.14.

[8] The additional thirteen days occurred during months for which there was no monthly average violation. There were numerous other violations of daily limits which occurred during months for which there was a violation of a monthly average limit. In addition, during five of the twenty-two months in which monthly averages were exceeded, there were such violations for more than one pollutant. There were therefore many "days of violation" on which multiple violations were found to have occurred. However, the district court, relying on United States v. Detrex Chem. Indus., Inc., 393 F. Supp. 735 (N.D. Ohio 1975), declined to set the maximum penalty for a given day at more than $10,000, regardless of whether more than one violation occurred on that day. 611 F. Supp. at 1554-55. This aspect of the district court's ruling is not raised by the parties on appeal, and we therefore do not address the question whether multiple violations attributable to a single day may give rise to a maximum penalty in excess of $10,000 for that day.

II.

A. Subject Matter Jurisdiction

Because it is undisputed that Gwaltney had ceased violating its permit before June 15, 1984, when suit was instituted, Gwaltney contends that the district court lacked jurisdiction over the subject matter of the suit. It argues that the plain language of the Act requires this result, because a defendant, under section 505(a), must be "in violation" of the Act for jurisdiction to attach.[9]

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[9] Section 505(a) actually confers jurisdiction in cases of a person "*alleged* to be in violation" of an effluent standard or limitation issued under the Act. Plaintiffs argue in the alternative, and the United States, as amicus curiae, asserts as its primary contention, that the statute be read as conferring citizen suit jurisdiction when there is a good faith *allegation* of a continuing violation. The district court itself offered, as an alternative basis for deciding this case, an interpretation of section 505(a) as a rule of good faith pleading, similar to the amount-in-controversy requirement for diversity jurisdiction. *See* 611 F. Supp. at 1549 n.8. In the latter instance, the amount stated in the plaintiff's complaint is determinative of jurisdiction, if made in good faith. The fact that the plaintiff ultimately recovers less than the jurisdictional amount does not divest the court of jurisdiction.

In the case before us, plaintiffs, in requesting civil penalties and injunctive relief, alleged that Gwaltney had continued to violate the Act after plaintiffs had given Gwaltney notice of their intent to sue, and that without appropriate judicial relief was a threat to continue its violations. A very sound argument can be made that plaintiffs' allegations of continuing violations were made in good faith, despite the fact that Gwaltney has not actually violated the Act since May 15, 1984. Given the facts that excessive TKN discharges are more likely in the winter than in warmer weather, and that Gwaltney had been responsible for numerous violations during the winter immediately prior to the filing of this suit, it was not at all clear at the time of filing in June 1984, that Gwaltney's new and unproven water treatment facilities would survive the coming winter without mishap.

However, our holding, as developed in the text, assumes the now-established fact that as of May 15, 1984, Gwaltney had ceased violating the limits of its NPDES permit. Because we hold that the Clean Water Act confers on the district court jurisdiction over

Gwaltney interprets this statutory language as requiring a polluter to be violating the Act at the time suit is filed against it. Gwaltney further contends that the structure of the statute and its legislative history limit the role of citizen suits to seeking abatement of ongoing violations and obtaining civil penalties for past violations only when jurisdiction is established by the existence of an ongoing one. We disagree with each of these contentions and hold that the Clean Water Act authorizes citizens, as "private attorneys general," *see* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 17, 14 n.23 (1981), to seek civil penalties for past violations of the Act as well as abatement of ongoing violations.

1. Statutory Language

Gwaltney argues that the ordinary meaning of section 505 requires that a defendant be engaged in a violation at the time the complaint against it is filed for jurisdiction to lie. *See* Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392, 395 (5 Cir. 1985). The *Hamker* court refused to read "to be in violation" as meaning "to have violated," stating that such an interpretation "obviously strains the grammar of the statute and diverges from its ordinary meaning." *Id.*

We respectfully disagree. We do not read the language as encompassing only those situations in which a defendant is currently violating the Act. Rather, we agree with the district court that the language is ambiguous, in that it can be read to comprehend unlawful conduct that occurred only prior to the filing of a lawsuit as well as

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citizen suits seeking civil penalties for past violations, we need not decide whether plaintiffs in this case made their allegations of continuing violations in good faith. Because being "in violation" of the Act encompasses more than just perpetration of ongoing violations, or chronic episodic violations likely to recur in the near future, such an allegation is not required for jurisdiction to lie.

unlawful conduct that continues into the present.[10] *See also* Student Public Interest Research Group v. Monsanto Co., 600 F. Supp. 1474, 1476 (D. N.J. 1985) ("A plausible construction of the language is that one is 'in violation' and continues to be 'in violation' by having 'violated.' In other words, the taint of a past violation is continuing."). We therefore cannot, as Gwaltney urges, rely on the "plain meaning" of this language in deciding this case. Instead, we look beyond the language itself to the structure of the statute and its legislative history to discern congressional intent as to the scope of citizen suit jurisdiction.

2. Statutory Structure

In light of the language of numerous other sections of the Act, Gwaltney's reliance on the words "in violation" to curtail the scope of citizen suits undermines its position. Virtually all of the enforcement provisions of the Act, for citizen and government enforcement alike, employ similar, present-tense phrasing. *See, e.g.*, 33 U.S.C. § 1319(a)(1) (EPA Administrator authorized to take enforcement action, including court action, whenever he "finds that any person *is in violation* of any condition or limitation . . . ."); *id.* § 1319(a)(3) (Administrator may issue a compliance order or file a civil suit whenever he "finds that any person *is in violation*" of certain provisions of the Act or of permit conditions or limitations); *id.* § 309(c)(1) (criminal penalties may be imposed on "[a]ny person who willfully or negligently *violates*" certain provisions of the Act or permit conditions or limita-

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[10] The district court offered a useful analogy to the situation of a taxpayer who underpays his taxes in one year and pays in full his taxes for subsequent years. Having once underpaid, he continues to be "in violation" of the tax laws, the relevant statute of limitations being the only obstacle to a finding of liability for the year of delinquency. 611 F. Supp. at 1547; *see also* Student Public Interest Research Group v. AT & T Bell Laboratories, 617 F. Supp. 1190, 1195 (D. N.J. 1985).

tions). It can hardly be questioned that the EPA has authority to bring suit for civil penalties for purely past violations. *Cf.* United States v. Earth Sciences, Inc., 599 F.2d 368, 375-76 (10 Cir. 1979) (EPA may, under 33 U.S.C. § 1319(a)(3), either issue a compliance order to prevent future pollution or seek civil penalties for past violations, or do both); United States v. Detrex Chemical Industries, Inc., 393 F. Supp. 735, 738 (N.D. Ohio 1975) (same); Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. 1190, 1197 (D. N.J. 1985) ("[T]here is no doubt that the EPA may bring suit based on past violations." Student Public Interest Research Group v. Monsanto Co., 600 F. Supp. 1474, 1476 (D. N.J. 1985) ("It can hardly be argued that the Government is restricted to abatement actions [to the exclusion of suits for civil penalties]"). Thus "in violation," in the context of government enforcement, has been construed to encompass past, completed violations as well as current, on-going transgressions. Any other reading of the Act would eliminate a significant deterrent to violations of the Act and severely undercut the Act's ambitious purpose, "to restore and maintain the chemical, physical and biological integrity of the nation's waters," 33 U.S.C. § 1251(a).

Similarly, a significant deterrent would be lost if citizen suits seeking civil penalties for past violations were not permitted. For this reason, the scope of citizen enforcement powers must, in this important respect, be viewed as co-extensive with the enforcement powers of the EPA. A number of courts have so held, based largely on the similarity of language between the provisions authorizing government units and the citizen suit provision. *See* Connecticut Fund for the Environment v. The Job Plating Co., 623 F. Supp. 207, 213 (D. Conn. 1985) ("[R]emedies obtainable in citizen suits should be co-extensive with those available in suits initiated by the federal government."); Student Public Interest Research

Group v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1425 (D. N.J. 1985) ("In suits under Section 505 of the Clean Water Act, citizens have the same remedies available to the EPA"); *AT&T Bell*, 617 F. Supp. at 1199 ("[T]o hold that citizen suits alone are barred from seeking civil penalties for past violations would thwart the goal of uniformity in enforcement.").

Gwaltney argues further that the Act is structured so that citizen suits are to play a "distinct and limited" role in the enforcement of the Act, one "supplementary" to the roles of state and federal agencies. While it cannot be denied that citizens' enforcement authority is narrower than that of government—citizens, for example, obviously cannot seek criminal penalties or issue compliance orders—the Act does not deprive citizens of the right to sue for past violations. This conclusion is supported by the fact that the Act does impose certain express limitations on the bringing of citizen suits. Section 505(b), 33 U.S.C. § 1365(b), provides that no citizen suit may be commenced less than sixty days after the plaintiff has given notice of an alleged violation to the Administrator, the state in which the violation occurs, and the alleged violator. The section also prohibits filing of a citizen suit if either the Administrator or the state has commenced and is diligently prosecuting a civil or criminal action in federal or state court. In such cases, however, a citizen is permitted to intervene as a matter of right. These provisions have been narrowly construed by the courts, *e.g.*, Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 63 (2 Cir. 1985) (initiation of *administrative* enforcement action by state agency did *not* preclude filing of citizen suit), and the Act contains no other express limits on institution of citizen suits. We read the statute as requiring only those limits on citizen suit jurisdiction that Congress expressly provided; we see no reason to impose by implication limits which Congress could have, but did not, create.

The fact that section 505(a) itself expressly authorizes the court in a citizen suit to "apply any appropriate civil penalties under [section 309(d), 33 U.S.C. 1319(d)]" lends further support to plaintiffs' position. Courts have relied on this fact in concluding that the Act authorizes citizen suits seeking civil penalties for past violations. *See, e.g., Georgia Pacific*, 615 F. Supp. at 1425 (language of sections 505(a) and 309(d) "has been held to sustain civil penalties for past violations") (citing United States v. Earth Sciences, Inc., 599 F.2d 368, 376 (10 Cir. 1979); *Monsanto*, 600 F. Supp. at 1476 (section 505(a) "quite specifically refers to the court's power to impose civil penalties and contains no limiting time frame"). Student Public Interest Research Group v. Anchor Thread Co., 22 Env't Rep. Cas. (BNA), 1150, 1154 (D. N.J. 1984); *Job Plating*, 623 F. Supp. at 213.[11]

Moreover, an expansive reading of the jurisdictional grant contained in section 505(a) is consistent with the recognition by Congress and the courts of the importance of citizen suits as an enforcement tool. *See* S. Rep. No. 414, 92d Cong., 1st Sess. 79 (1971), *reprinted in* 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 1497 [hereinafter cited as *Legislative History*] ("The Committee has established a provision in the bill that would provide

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[11] Gwaltney criticizes the logic of these opinions, arguing that they confuse the threshold issue of jurisdiction with the issue of penalties available once jurisdiction attaches and liability is found. Gwaltney contends that although the Act does provide for civil penalties, and even for penalties based on past violations, no relief whatsoever is available unless there is an ongoing violation on which to ground jurisdiction under section 505(a).

There is some merit to this argument, because technically the issues of jurisdiction and penalties are analytically distinct. However, the Act's provision for civil penalties in citizen suits cannot be totally ignored. When read in conjunction with the Act's overall structure and its legislative history, it suggests strongly that citizens should be allowed to seek civil penalties for past violations even in the absence of an ongoing violation.

citizen participation in the enforcement of control requirements and regulations under the Act modeled on the Clean Air Amendments of 1970. . . . One modification would allow the courts to impose civil penalties provided as a result of actions brought by citizens."); Clean Water Act Amendments of 1985, Senate Environment and Public Works Comm., S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985). ("Citizen suits are a proven enforcement tool. They operate as Congress intended—both to spur and supplement government enforcement actions. They have deterred violators and resulted in significant compliance gains."); *AT&T Bell*, 617 F. Supp. at 1199 (fact that *Middlesex* court viewed citizens as "private attorneys general" under the Act, "suggest[s] that Congress intended citizens to step into the shoes of government agencies that failed to act").

Given this recognition of the importance of citizen suits seeking civil penalties, and the fact that Congress knew how to, and did, in some ways, expressly limit the application of these suits, there is no reason to suppose that Congress intended to impose an additional restriction—the requirement of an *ongoing* violation—not expressly provided for and not imposed on civil suits by the government.

3. Legislative History

Gwaltney also contends that the legislative history of the Act firmly supports its position. The fact is that the legislative history does not conclusively support either side's position, but to the extent it speaks to the jurisdictional issue before us, we conclude that it favors the plaintiffs.

Gwaltney relies almost exclusively on passages from the Act's legislative history that emphasize the use of citizen suits to *abate* ongoing violations. *See, e.g.*, S. Rep. No. 414, 92d Cong., 1st Sess. 79-81, *reprinted in* 2 *Legislative History* at 1497-98. The cited passages, how-

ever, do not state that abatement of ongoing violations is the *only* relief available under section 505(a), and in fact refer to the availability of civil penalties. *Id.* at 1497.[12]

The sections of the legislative history that speak most directly to the issue before us are the oral and written statements of Senator Muskie,[13] one of the principal authors and sponsors of the bill, commenting on the Conference Committee's conclusions, which he presented on the Senate floor. Most notably, Mr. Muskie stated: "As in the original Senate bill, a citizen has the right under section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be *or to have been*, in violation, whether the violation be a continuous one, or an occasional or sporadic one." 118 Cong. Rec. 33700, (1972), *reprinted in* 1 *Legislative History* at 179 (emphasis added). The Senator also noted that "[c]itizen suits can be brought to enforce against both con-

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[12] Gwaltney notes further that the same emphasis on abatement appears in the history of the Clean Air Act citizen suit provision, 42 U.S.C. § 7604, on which Section 505 of the Clean Water Act was modeled. Citations to the Clean Air Act and its history are of course completely inapposite to our case, because that statute's citizen suit provision permits *only* suits for injunctions. Discussion of that provision would necessarily deal only with abatement of ongoing violations.

[13] While it is true that the remarks of a single legislator are not normally accorded great weight in discerning Congress' intent, Senator Muskie, in relation to the Clean Water Act Amendments of 1972, stands on a somewhat different footing. Because of his crucial role in the drafting and sponsorship of the bill that became the Clean Water Act, we give his comments significant weight. Other courts too have had occasion to rely on Muskie's remarks regarding the intent and meaning of the Act. *See, e.g.*, American Frozen Food Institute v. Train, 539 F.2d 107, 118-20 (D.C. Cir. 1976) (quoting extensively from Muskie's comments as an aid in interpreting sections 301 and 304 of the Act); American Meat Institute v. EPA, 526 F.2d 442, 451-52 (7 Cir. 1975) (relying on written comments by Muskie, as "the principal author of the Act").

tinuous and intermittent violations." *Id.* at 163. Mr. Muskie's comments indicate quite strongly that the Act was intended to permit citizens, as private attorneys general, to sue violators even in the absence of a violation that is ongoing at the time suit is filed.

4. The *Hamker* Decision

Gwaltney relies heavily on Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392 (5 Cir. 1985). As suggested in Section IIA(1) above, we find the reliance to be misplaced. *Hamker* involved a citizen suit seeking civil penalties, an injunction, and damages by way of pendent state law claims, as a result of an oil spill, a one-time occurrence that took place many months before suit was filed. There was no effluent permit or compliance order involved. The *Hamker* court relied chiefly on the "ordinary meaning" of the statute and on Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), in concluding that prospective relief is the only kind of relief authorized by the Act's citizen suit provision, and that civil penalties are available "only as prospective relief." 756 F.2d at 398-99. Because no permit violation was involved in *Hamker*, because only a single long-past and non-recurring discharge (for which not even a good faith allegation of a possible continuing violation could have been made), and because the Hamkers failed to allege a violation of any effluent standard or limitation under the Act, it could be argued that *Hamker* is distinguishable on its facts and on that basis inapplicable to the case before us. But even if not distinguishable, we decline to follow it to the extent that it holds that section 505(a) of the Clean Water Act does not permit citizen suits seeking civil penalties for past violations. As we have discussed above, we disagree that the "ordinary meaning" of the statute requires the adoption of the rule espoused in *Hamker*. The language "to be in violation of" is at least ambiguous, and our reading of the statute as a whole and

its legislative history lead us to interpret that language as permitting citizen suits for violations occurring solely in the past.

In addition, we find the reliance by the *Hamker* court, and by the defendant in the case before us, on the Supreme Court's opinion in *Middlesex* to be misplaced. The issue in *Middlesex* was whether the Clean Water Act, with its "elaborate enforcement provisions," 453 U.S. at 13, authorized an implied private cause of action for damages as well. The Court held that it did not. Any statements that might be read as limiting the scope of citizen suits to prospective relief were mere dicta.[14] The Court, in fact, acknowledged the availability of civil penalties under the Act. *Id.* at 14 n.25.

A final comment is required concerning Gwaltney's expressed concern that to allow suits such as the one at bar may result in the inundation of federal courts with Clean Water Act citizen suits, contrary to the underlying policy of the Act. The *Hamker* court voiced a similar concern:

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[14] Gwaltney's reliance on City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008 (7 Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980), is similarly flawed, as the issue in that case also was whether private damages are available under the Act. The court's statement that the Act "does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past or for recovery of damages," *id.* at 1014, was made in that context and is dictum. In addition, plaintiffs in *City of Evansville* had failed to comply with the sixty-day requirement of section 505(b), which was itself an adequate ground for dismissal. The court's comments regarding availability of civil penalties for past violations was therefore wholly unnecessary to its decision. *See also* Illinois v. Outboard Marine Corp., 619 F.2d 623, 631 (7 Cir. 1980), *vacated and remanded*, 453 U.S. 917 (1981), *on remand*, 680 F.2d 473 (7 Cir. 1982) (citing *City of Evansville*, but similarly failing to address the issue of availability of citizen suit penalties for past violations); Pawtuxet Cove Marina v. Ciba-Geigy Corp., 21 Env't Rep. Cas. (BNA) 1390, 1393 (D.R.I. 1984) (citing *City of Evansville*).

> If section 1365 were interpreted as permitting citizen suits for civil penalties for past violations, all state damage claims which could be brought under pendent jurisdiction could be litigated in a federal forum, thus undermining congressional intent to limit the burden on the district courts.

756 F.2d at 396. The concern is a real one, but does not require us to place undue restrictions on the scope of citizen suits under the Act. The wary exercise of pendent jurisdiction by the district courts could limit the burden imposed by citizen suits on the federal court system. While the district courts have the power, by invoking pendent jurisdiction, to hear state law claims asserted in federal court, the authority to exercise that power is discretionary. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) ("It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.") In the case of the Clean Water Act, under which it was the intent of Congress to preclude suits for damages, *see Middlesex*, 453 U.S. at 18, a district court would be acting within its discretionary authority in refusing to exercise jurisdiction over state law damages claims. This would be particularly true in cases such as *Hamker*, where it is apparent that a plaintiff's claim is predominantly a state law damages claim, with the Clean Water Act serving merely as a vehicle for bringing that claim in federal court. Refusal to entertain such claims would eliminate the lure of obtaining damages in federal court and thus avoid the "floodgates" problem envisioned by the *Hamker* court.

In sum, we hold that citizen suits like the one at bar, seeking civil penalties for permit violations committed entirely in the past, are permitted under section 505(a). Gwaltney has not asserted, and indeed could not assert, given section 505(a)'s express provision for "appropriate civil penalties under section [309(a), 33 U.S.C. § 1319

(d)],” that civil penalties may never be assessed in a citizen suit. However, the narrow reading of section 505(a) that it urges, creating jurisdiction to impose such penalties only in suits involving violations that continue up to the time suit is filed, places an untenable limitation on the use of citizen suits and civil penalties as a tool of enforcement and deterrence.

B. Gwaltney's Violations of Monthly Average Limitations

Gwaltney argues that the district court committed reversible error when, in computing a potential maximum civil penalty pursuant to 33 U.S.C. § 1319(d), it treated each violation of a monthly average limitation as equivalent to a daily violation for each day of that month. Gwaltney suggests instead that a monthly violation be treated as a single day of violation. We disagree.

There is very little authority addressing this issue. Neither party cites any administrative regulatory materials that direct us in assessing penalties under 33 U.S.C. § 1319(d) for exceeding a monthly average limitation, and we have found none. In the one reported case that has dealt with this matter, the court was not faced with precisely the same issue as is before us. In United States v. Amoco Oil Co., 580 F. Supp. 1042 (W.D. Mo. 1984), the EPA sought civil penalties for numerous violations of monthly average limitations in Amoco's permit. Amoco argued that, because such average limitations could not be related to a specific, given day, *no* civil penalty could be imposed under 33 U.S.C. § 1319(d). Because Amoco's permit contained no daily maximum limitations, Amoco would have been subject to no penalty whatsoever if the court had accepted its argument. Faced with this alternative, the court held that Amoco was subject to a penalty for each day of each month in which a monthly average limitation was exceeded. In the case before us, the district court could have assessed penalties

for numerous daily violations without resorting to the more extreme approach followed by the *Amoco* court.

Although the *Amoco* court may have, as Gwaltney argues, gone beyond what was necessary to decide the issue before it, we nevertheless concur in that court's reasoning and interpretation of 33 U.S.C. § 1319(d).

We think that the language of the statute supports this view. While the statute does not address directly the matter of monthly average limitations,[18] it does speak in terms of penalties per *day* of violation, rather than penalties per *violation*. This language strongly suggests that where a violation is defined in terms of a time period longer than a day, the maximum penalty assessable for that violation should be defined in terms of the number of days in that time period. We agree with the district court, that "[i]t is difficult . . . to imagine how the violation of a monthly limitation involves any number of days other than the number of days in that month." 611 F. Supp. at 1552. We certainly must reject the view of the defendant in *Amoco*, that violation of a monthly limitation should be treated as no violation at all. It makes little more sense to treat a monthly violation as one day of violation, as Gwaltney would have us do. This approach, in essence, sets a maximum penalty *per violation*, rather than per day of violation, a result which we see as inconsistent with the language of § 1319(d).

Moreover, the approach employed by the *Amoco* court and the district court in the instant case is essential to providing a district court a framework within which it will have sufficient flexibility to assess penalties that suit the particular circumstances of each case. A hypothetical

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[18] The concept of monthly average limitations was developed after the enactment of 33 U.S.C. § 1319(d). The monthly average concept was a regulatory creation of the EPA. *See* 37 Fed. Reg. 28,396 (Dec. 22, 1972); 44 Fed. Reg. 32,908 (June 7, 1979); 40 C.F.R. § 122.45(d) (1985).

offered by the district court serves to illustrate this point. The court's hypothetical polluter very nearly exceeds its daily maximum every day of the month. This polluter would far exceed its monthly average limitation,[18] and would be liable for violating that limitation. According to Gwaltney's view, however, a court would be required to treat such conduct as one single day of violation. This would prevent the court from imposing over $10,000 in penalties for a full month of substantial discharges. We, like the district court, do not find this result sensible. The illogic of the approach is further illustrated by considering a situation very similar to the district court's hypothetical: The polluter just barely *exceeds* its daily maximum for each day of a month. This polluter would be subject to liability for thirty days of violation (a maximum penalty of $300,000), although its total discharge is only slightly more than the first polluter, who, according to Gwaltney's view, would be subject to only one day's penalty ($10,000 maximum). Gwaltney's approach thus could act to deprive a district court of the flexibility to deal with similar cases similarly, imposing a drastic limitation on the court's authority to assess "appropriate" civil penalties.

Gwaltney has offered its own hypothetical in an effort to expose the unfairness of the approach employed by the district court. Gwaltney imagines a polluter which discharges, for twenty-nine days of a month, 98% of the amount it would have to average each day to exceed its monthly limit. On one day, however, the polluter discharges 180% of that amount (the latter amount still being less than the daily maximum limitation). This polluter has violated its monthly average limitation, and, according to the district court's view, would be subject to penalties for thirty days of violation (a $300,000

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[18] As discussed above, the daily maximum limitations in Gwaltney's NPDES permit are roughly twice as high as the monthly average limitations. *See supra* note 6.

maximum penalty), even though it never once exceeded its daily maximum.[17]

The seeming unfairness of the situation in Gwaltney's hypothetical dissipates when one recalls that § 1319(d) serves only to set a *maximum* penalty. Within this limit, the district court in its discretion may set an "appropriate" penalty. A district court, applying the approach to penalty assessment that we adopt, could (and indeed should, all else being equal) impose a substantially

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[17] This hypothetical was advanced by Gwaltney in the district court. The district court attacked Gwaltney's use of this hypothetical as an attempt to suggest that environmental damage is caused, and penalties therefore appropriate, only for violations of *daily limitations*. As the district court noted, 611 F. Supp. at 1553, this suggestion ignores the concept that both large, isolated discharges and moderate, long-term discharges are potentially harmful. This is presumably why NPDES permits like Gwaltney's contain monthly average limitations that are substantially lower than the daily limitations.

In its brief on appeal, Gwaltney presents a slightly different hypothetical, tied somewhat more closely to the realities of this case: A polluter calculates its monthly average on the basis of six monthly samples. On five of the six sample days, little or no effluent is discharged, and on the sixth, the discharge is so great that the monthly average limitation is exceeded for the month. There is thus only one identifiable day of excessive discharge; yet, the polluter is subject to a maximum penalty corresponding to thirty days of violation.

Because it involves damage caused by a single event, rather than by continuous discharges, this hypothetical is not as vulnerable as the first to the district court's criticism. On the other hand, EPA regulations provide for monthly average permit limits only for pollutants that are discharged continuously, 40 C.F.R. § 122.45(d)(2), so that a polluter who discharges in a pattern like that posited in Gwaltney's second hypothetical might not be subject to a monthly average limit in the first place. In any event, scenarios like Gwaltney's second hypothetical do not require us to reject the district court's approach to setting the maximum penalty. As discussed in the text, while the court may set a large maximum penalty in such a case, it retains discretion to assess a penalty much smaller than the maximum, as the situation requires.

smaller penalty on Gwaltney's hypothetical polluter than on either of the polluters in the first two hypotheticals discussed.

Again, what is important is to adopt an approach that will give district courts the continuity of possibilities necessary for them to assess appropriate sanctions in every case. The district court's approach achieves this end.

C. Amount of Penalty

Gwaltney contends that, in a number of ways, the district court abused its discretion and exceeded its statutory authority in establishing the amount of the penalty in this case.

First, Gwaltney argues that, in assessing a part of the penalty, the court impermissibly shifted the burden of proof to Gwaltney. The district court found that Gwaltney was responsible for thirteen violations of daily limitations occurring during months in which the monthly average limitation was not violated. Gwaltney's DMR's did not show on precisely which days the violations occurred; they could conceivably have occurred on as few as seven days. *See* 611 F. Supp. at 1556 & n.15. The court presumed that they occurred on thirteen separate days, leaving it to Gwaltney to demonstrate through records solely within its control, that there was some "overlap" [18] of violations, thus reducing the total number of days of violation. Because Gwaltney failed to come forward with evidence showing overlapping violations, the district court relied on the presumption that thirteen separate daily violations had occurred.

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[18] The question of "overlap" is only pertinent in light of the district court's holding that $10,000 is the maximum penalty per day regardless of how many different violations occurred on that day. The parties have not raised this issue on appeal. *See supra* note 8.

We find no infirmity in the district court's approach. Plaintiffs, by showing that thirteen violations of daily maximums had occurred, had in essence established a prima facie case of thirteen daily violations. Requiring Gwaltney to come forward with some evidence to rebut this is not impermissible, particularly where, as here, such information would appear to be peculiarly within the knowledge of Gwaltney. *See* Campbell v. United States, 365 U.S. 85, 96 (1961) ("The ordinary rule, based on notions of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.") (quoting United States v. New York, N.H. & H.R.R., 355 U.S. 253, 256 n.5 (1957)). Moreover, by requiring permit holders to monitor their discharges and report them through DMR's, 33 U.S.C. § 1318(a)(3)(A); 40 C.F.R. § 122.41(l)(4), the Act itself places on the permit-holder a burden of showing compliance with the permit's limitations. In addition, as we have stressed repeatedly, deciding the number of days of violation is relevant only in determining the *maximum* allowable penalty, and the district court is not obliged to assess the entire maximum amount. For these reasons, the court's requiring Gwaltney to show that the actual number of days of violation was less than the thirteen violations that appeared on the face of its DMR's, does not require a reassessment of the penalty imposed.

Gwaltney's remaining contentions regarding the penalty assessed require little discussion.

As noted above, the district court and the parties agreed that in assessing penalties the court would use the EPA's Civil Penalty Policy, 41 Env't Rep. (BNA) 2991 (Feb. 16, 1984), as a guideline. Gwaltney now complains that in adjusting the penalty to reflect the "gravity" of Gwaltney's violations, the court exceeded the percentage increase recommended by the EPA policy. The EPA policy, however, is an internal document for

agency guidance, and is not binding on the district court. The court agreed only to use the policy as a guideline, *see* 611 F. Supp. at 1556, and is not limited strictly by its terms in imposing an "appropriate" civil penalty. 33 U.S.C. § 1365(a).

Next, Gwaltney contends that the district court abused its discretion by assessing a penalty that failed to further the goal, espoused in the EPA Civil Penalty Policy, of "fair and equitable treatment of the regulated community." Specifically, Gwaltney complains that the penalty assessed is much greater than those assessed in a handful of "similar" cases decided five or more years prior to this one. We do not undertake a detailed comparison of this and prior cases in order to determine the propriety of the penalty assessed below. Each case must stand on its own merits, and here the district court applied the agreed upon guidelines in a thorough, thoughtful, and rational manner. We do not view the outcome thus reached as arbitrary or an abuse of discretion.

Gwaltney also complains that the district court abused its discretion when, in adjusting the penalty to account for delays in compliance, it assessed a penalty for each day of unjustified delay, regardless of whether a violation actually occurred on each of those days. Because 33 U.S.C. § 1319(d) speaks in terms of penalties *per day* of violation, Gwaltney contends that the court erred in imposing penalties for days on which no violation occurred, and that its penalty should be reduced accordingly. We disagree. The Act speaks in terms of days of violation only for the purpose of establishing the maximum penalty assessable. *Id.* The district court properly considered Gwaltney's days of violation in setting a maximum penalty of $6.66 million for 666 days of violation. Within that framework the court was permitted, in its discretion, to craft an "appropriate" penalty. *Id.* § 1365(a). This the court also did when, pursuant to the EPA Civil Penalty Policy, it penalized Gwaltney for unexcused de-

lays in improving its effluent treatment systems. We see no abuse of discretion in the district court's action.

III.

To summarize, for the reasons stated, we concur in the conclusion of the district court and hold that the absence of an ongoing violation does not defeat federal subject matter jurisdiction over a citizen suit brought under section 505(a) of the Clean Water Act, and that civil penalties for past violations are an available remedy in such a suit.

We hold also that for the purpose of fixing an "appropriate" civil penalty which, pursuant to 33 U.S.C. § 1319(d), may be fixed at a maximum of $10,000 per day of violation, violations of "average" limitations encompassing periods greater than one day are to be treated as a violation for each day of the time period involved. The district court therefore properly employed this approach in setting Gwaltney's maximum penalty, and did not abuse its discretion in calculating the penalty actually assessed against Gwaltney.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, *et al.*,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[Filed June 26, 1985]

MEMORANDUM

Before the Court is the question of the amount that ought to be assessed, in civil penalties, against defendant for polluting Virginia's waters in violation of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (the "Act"). The Court has already determined, in granting plaintiffs' motion for partial summary judgment on the issue of liability, that defendant has violated the Act; the parties do not now contest liability. They do, however, differ over (i) defendant's maximum liability for its violations; and (ii) the appropriate penalty for those violations. Plaintiffs contend that defendant is subject to a maximum of $8,300,000 in civil penalties, and that the full measure of liability should be imposed. Defendant, on the other hand, contends that it is subject to a maximum

of about $980,000 in civil penalties, and that the Court should assess somewhere between $12,000 and $20,000.

Defendant also vigorously contests the Court's subject-matter jurisdiction over this lawsuit. First, it argues that plaintiffs do not have standing to prosecute this action. Second, it argues that the statute does not authorize citizen suits against defendants who are not discharging unlawfully when the suit is filed.

Following trial, defendant sought and received the Court's leave to file a post-trial memorandum; about a month thereafter, defendant filed that memorandum. Plaintiffs filed a short response, and also had filed a trial memorandum on the day prior to trial. Several months later, defendant filed a motion to dismiss based on its argument that a continuing violation is required, which has been fully briefed. All the foregoing matters are now ripe for disposition.

BACKGROUND

This suit is a citizen enforcement action—a "citizen suit"—authorized by Section 505 of the Clean Water Act, 33 U.S.C. § 1365. Plaintiffs are two non-profit corporations dedicated to protecting natural resources: the Chesapeake Bay Foundation (CBF), a regional environmental group with over 19,000 members residing in the Chesapeake Bay area, including Virginia; and the Natural Resources Defense Council (NRDC), an environmental group with members throughout the nation, including over 800 members in Virginia. Defendant, Gwaltney of Smithfield, Ltd. (Gwaltney), is in the business of processing and packing pork products. It is a subsidiary of Smithfield Foods, Inc. (Smithfield Foods). Gwaltney's plant, the operation of which is the subject of this lawsuit, is situated on the Pagan River near Smithfield, Virginia. In the course of its production, the plant discharges wastewater into that river.

At all times material hereto, Gwaltney was allowed to discharge various pollutants from that plant into the river—within certain limits, as set out in a "National Pollution Discharge Elimination System" (NPDES) permit.[1] Such permits are issued pursuant to procedures and regulations under the Clean Water Act. *See* 33 U.S.C. § 1342.

From October 27, 1981 until May 15, 1984, Gwaltney's plant exceeded its discharge limitation for a variety of pollutants[2] on a number of occasions. Gwaltney itself reported these violations in its discharge monitoring reports (DMRs), as required by law.[3] Prior to October 27, 1981, Gwaltney was not responsible for the pollution discharges from the plant at issue here. Instead, ITT-Gwaltney, Inc. (ITT-Gwaltney) owned the plant and was responsible. Under ITT-Gwaltney as well as under Gwaltney, the plant repeatedly exceeded a number of its NPDES discharge limitations. Gwaltney acknowledges that it was aware of ITT-Gwaltney's record of noncompliance. Only the violations subsequent to Gwaltney's assumption of responsibility on October 27, 1981, are at issue here, however.

The violations reported in Gwaltney's DMRs form the basis of this action. Where a permittee is in violation of an NPDES discharge limitation, it is also "in violation of . . . an effluent standard or limitation under [the

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[1] NPDES Permit No. VA 0002844.

[2] Those pollutants are: (i) fecal coliform; (ii) chlorine (Cl_2); (iii) total suspended solids (TSS); (iv) total Kjeldahl nitrogen (TKN); and (v) oil and grease.

[3] Section 1318(a)(3)(A) of Title 33 mandates, among other things, that the Administrator of the Environmental Protection Agency "require the owner or operator of any point source" to establish and maintain such records of effluent discharges and to make such reports as the Administrator may "reasonably require." Currently, permittees under the Clean Water Act must submit DMRs. *See* 40 C.F.R. § 122.41(l)(4) (1984). Such reports are public information, by statute. *See* 33 U.S.C. § 1318(b)(2).

Act]," 33 U.S.C. § 1365(a)(1), which makes the permittee subject to citizen suits. *Id.* For citizen suits under the Clean Water Act, Congress has authorized the district courts to assess appropriate civil penalties. 33 U.S.C. § 1365(a). Such penalties may be as high as "$10,000 per day of such violation." 33 U.S.C. § 1319(d).

DISCUSSION

I. Standing.

At the outset, the Court must dispose of defendant's contention that plaintiffs have no standing under either the Act or Article III of the Constitution. Standing is an element of jurisdiction over the subject matter. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 494-95 (1975). Thus, if plaintiffs have no standing, then the Court may not proceed further. *See id.*

Gwaltney contends that plaintiffs' allegations are insufficient to establish standing for CBF and NRDC to sue in their own right. It then acknowledges that the allegations of standing in the complaint, taken alone, might be sufficient for CBF and NRDC to sue on behalf of some of their members. But Gwaltney argues that no such standing has been established because plaintiffs did not present evidence of standing at trial, even though Gwaltney denied plaintiffs' standing allegations in its answer and Gwaltney's counsel demanded prior to trial that plaintiffs' counsel establish at trial that plaintiffs meet the Clean Water Act's standing requirements as articulated in *Sierra Club v. SCM Corp.*, 747 F.2d 99 (2d Cir. 1984). Plaintiffs, on the other hand, argue that they have established standing to sue both in their own right and on behalf of their members. As for standing to sue for their members, they refer to the Court's findings in granting them summary judgment on the issue of liability, as well as to a number of affidavits they have filed at different stages of the litigation.

It is clear that, at least under the Clean Water Act,[4] a citizen enforcer can only establish standing if it meets the requirements of "injury in fact" set forth in *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). *See, e.g., Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 (2d Cir. 1984). An organizational plaintiff, such as CBF or NRDC, can establish "injury in fact" through injury to their members as well as through injury to the organization itself. *See, e.g., Sierra Club v. Morton*, 405 U.S. at 739. The parties do not dispute these basic principles of standing.

The Court need not consider the dispute over whether plaintiffs have established standing to sue in their own right, because it concludes that they have established standing to sue on behalf of their members. They established such standing when the Court granted their motion for summary judgment on the issue of liability. In support of that motion, plaintiffs included an affidavit of one of their counsel stating:

> Members of CBF reside in Virginia, in the vicinity of the Pagan River, and recreate in, on, or near, and otherwise use or enjoy the Pagan River and the water system of which it is a part. . . . The interests of CBF and of CBF's members have been, are being, and will be adversely affected by [Gwaltney's] failure to comply with its NPDES permit requirements.

The affidavit included an identical paragraph about members of NRDC. Defendant failed to dispute this in any

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[4] Standing requirements may be more lenient for citizen enforcers suing under the citizen suit provisions of other environmental statutes, where—unlike the Clean Water Act § 505(g), 33 U.S.C. § 1365(g)—there is no limitation of "citizen" to a person "having an interest which is or may be adversely affected." *See, e.g.*, Clean Air Act § 304(a), 42 U.S.C. § 7604(a) (1982) ("any person" can sue); *Metropolitan Washington Coalition for Clean Air v. Washington, D.C.*, 511 F.2d 809, 814 (D.C. Cir. 1975) (discussing standing requirements under the Clean Air Act).

way at the summary judgment hearing, although it had raised the standing issue at the pleading stage.[8] Indeed, Gwaltney failed to file any response whatsoever to plaintiffs' motion for summary judgment, despite the fact that two months had elapsed between the filing of plaintiffs' motion and the hearing on it. In granting plaintiffs' motion the Court specifically stated, in its findings of fact from the bench, that plaintiffs have standing to prosecute this action.

Apparently, Gwaltney believes that any showing of standing that plaintiffs may have made previously is insufficient in light of a recent decision by the Court of Appeals for the Second Circuit, *Sierra Club v. SCM*, *supra*, 747 F.2d 99, construing standing requirements under the Clean Water Act. Gwaltney suggests that the case establishes a requirement that plaintiffs identify affected members in order to establish standing under the Act. The Court does not agree, however.

In *Sierra Club v. SCM*, the issue pertaining to standing before the Court of Appeals was whether the Sierra Club, solely on the basis of its "institutional interest in the preservation of the environment," could sustain "injury in fact" for standing purposes in a citizen suit under the Clean Water Act. *See Sierra Club v. SCM*, *supra*, 747 F.2d at 103. Writing for a unanimous panel, Judge Kearse rejected Sierra Club's contention. After carefully reviewing the legislative history of the Act, she concluded that the Sierra Club could only establish standing by showing actual injury within the meaning of *Sierra Club v. Morton*, 405 U.S. 727 (1972), and that the Sierra Club's "institutional interest" was insufficient in that regard. *Id.* at 107. She further held that an

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[8] Gwaltney filed a document titled "Answer and Motion to Dismiss," in which it denied plaintiffs' standing allegations in its "Third Defense." The answer and motion were unaccompanied by any documents that might create a genuine issue of material fact as to plaintiffs' standing, however.

organizational plaintiff can satisfy the actual injury requirement by "providing a concrete indication" that the organization or "one or more of its members" use the waterway into which the defendant discharges its wastes or would be adversely affected by the pollution of that waterway. *Id.*

Despite defendant's suggestion to the contrary, Judge Kearse did not hold that a plaintiff organization must identify its injured members in order to provide the requisite "concrete indication." It is true, of course, that the district judge had dismissed the complaint—at least in part—because the Sierra Club refused to identify any injured member. *See Sierra Club v. SCM Corp.*, 580 F. Supp. 862, 865 (W.D.N.Y. 1981). Despite the controversy in the district court over Sierra Club's refusal to identify members, though—of which the Court of Appeals was well aware, *see Sierra Club v. SCM*, *supra*, 747 F.2d at 102—the Court of Appeals carefully avoided holding that an organization suing under the Clean Water Act must identify injured members in order to establish standing through them. Instead, Judge Kearse —noting that the Sierra Club had submitted an affidavit indicating merely that some of its members lived within a seventy-mile radius of the polluting plant—chose more general language to describe the requisite showing for standing: a "concrete indication" that one or more members "used the [waterway involved] or would be affected by its pollution." Plaintiffs here have satisfied this standard. The unopposed affidavit of plaintiffs' counsel quoted *supra*, which indicates that members of plaintiffs' organization use the river into which defendant discharges its wastes, is sufficient to establish plaintiffs' standing under the Clean Water Act.[6]

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[6] In any event, plaintiffs did ultimately name members. In their response to defendant's post-trial memorandum, plaintiffs attached the affidavits of three affected members who indicated specifically how they used the Pagan River (or the Chesapeake Bay into

II. Continuing Violation.

Gwaltney also argues that the Court has no jurisdiction over this suit because Gwaltney was not in violation of its NPDES permit when the complaint was filed, or subsequently. Gwaltney contends that the Clean Water Act's citizen suit provision only confers jurisdiction where the polluter is engaged in an ongoing violation; where the violation occurred entirely in the past, Gwaltney urges that there is no jurisdiction. Plaintiffs contend, on the contrary, that citizens can sue regardless of whether the polluter's unlawful conduct was continuing at the time the suit was filed.

The dispute is one of statutory construction. Gwaltney's argument centers around the portion of the Clean Water Act's citizen suit provision that reads, in pertinent part:

> . . . any citizen may commence a civil action on his own behalf—
>
> (1) against any person . . . who is alleged *to be in violation* of (A) an effluent standard or limitation under this chapter . . . .

33 U.S.C. § 1365(a)(1) (emphasis added). Gwaltney points out that the statute does not include the words "to have violated," and argues that the statute therefore only authorizes citizen suits against polluters whose unlawful conduct is occurring at the time the suit is filed.

In analyzing whether Gwaltney's position is correct, the Court begins with the familiar principal that it need not consider a statute's legislative history where the statutory language itself is clear. *See, e.g., Ex Parte Collett*, 337 U.S. 55, 61 (1949). Despite Gwaltney's protestations to the contrary, the Court does not believe that the statutory language on which Gwaltney rests its argu-

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which it flows), and how they are adversely affected by the pollution of the Pagan River.

ment clearly supports Gwaltney's position. Other courts besides this one have perceived ambiguity in the statutory language at issue. *See Student Public Interest Research Group of New Jersey, Inc .v. Monsanto Co.*, 600 F. Supp. 1474, 1476, (D.N.J. 1985); *Sierra Club v. Raytheon*, 22 Env. Rep. Cases 1050, 1054 (D. Mass. 1984). The words "to be in violation" may reasonably be read as comprehending unlawful conduct that occurred solely prior to to the filing of the lawsuit as well as unlawful conduct that continues into the present. For example, a person who under-pays taxes one year remains "in violation" of the relevant tax laws, even though that person pays the proper amount of taxes for the following year. Similarly, a polluter that exceeds various discharge limitations in its NPDES permit, such as Gwaltney, arguably remains "in violation" with respect to those excesses, even though in subsequent years it brings itself into compliance. Indeed, its discharge violations remain on the records, and the effects of the excess discharges may linger well after they occur.

In addition to the ambiguity in the words "to be in violation" standing alone, other portions of Section 1365 suggest that Gwaltney's proffered construction is not the only—or the most—plausible one. Section 1365 states that:

> The district courts shall have jurisdiction . . . to apply any appropriate civil penalties under [33 U.S.C. § 1319(d)].

33 U.S.C. § 1365(a). Section 1319(d) authorizes civil penalties "not to exceed $10,000 per day of . . . violation." 33 U.S.C. § 1319(d). Neither Section 1319(d) nor the citizen-suit provision itself expressly limits the imposition of such civil penalties to polluters that persist in their unlawful conduct up to the time the complaint is filed. On the contrary, the absence of any such limitation implies that Congress intended to authorize citizen

suits to recover civil penalties based on a polluter's unlawful conduct in the past, regardless of whether the polluter has ceased its unlawful conduct by the time the citizen suit is brought. In the Court's view, the statutory language, fairly read, suggests that the Act authorizes citizen suits for civil penalties based on unlawful conduct that occurred in the past, regardless of whether a polluter is in compliance when the suit is brought.

In view of the ambiguity of the statutory language, however, the Court has also reviewed relevant portions of the legislative history in order to better understand Congress's intent. The committee reports do not expressly address the issue at hand one way or another. They do, however, note that the statute authorizes the recovery of civil penalties in citizen suits. The reports do not discuss any requirement that such suits must be based on unlawful conduct occurring at the time the suit is filed. *See* H.Rep. No. 911, 92d Cong., 2d Sess. 133 (1972), *reprinted in* 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972* at 820 (1973) (hereinafter "Legislative History"); S.Rep. No. 414, 92d Cong., 1st Sess. 79, *reprinted in* 2 *Legislative History* at 1497. As already referred to, the absence of any discussion of such a requirement—in the context of acknowledging the general availability of civil penalties—implies that such a requirement was never contemplated.

The legislative history provides direct support, as well as support by implication, for the view that the Clean Water Act authorizes citizen suits based on unlawful conduct that occurred in the past regardless of whether the conduct continues through the time the complaint is filed. Senator Muskie, the manager in the Senate of the bill that added the citizen suit provision to the Act, stated:

> . . . a citizen has a right under Section 505 to bring an action for an appropriate remedy in the case of

> *any person who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one.*

See 118 *Cong. Rec.* 33,700, *reprinted in* 1 *Legislative History* at 179 (emphasis added). Gwaltney acknowledges that Senator Muskie's remark supports plaintiff's position and undermines its own. But it attempts to eliminate the force of his explication by noting that it is the remark of only an individual legislator. To be sure, a court cannot allow colloquies among legislators to materially alter clear statutory language. *See, e.g., Regan v. Wald*, —— U.S. ——, ——, 52 U.S.L.W. 4966, 4970 (1984). But such is not the case here. Rather, Senator Muskie's remark lends further support to a plausible reading—and one which is uncontradicted by the statute itself and other legislative materials[7]—of ambiguous statutory language.

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[7] Gwaltney also quotes a remark of Senator Bayh in support of its position. Senator Bayh's remark is as follows:

> These sorts of citizen suits—in which a citizen can obtain an injunction but cannot obtain money damages for himself—are a very useful additional tool in enforcing environmental protection laws.

1 *Legislative History* at 221. Gwaltney argues that the fact that Senator Bayh did not mention civil penalties—and did mention injunctive relief—somehow indicates that Senator Muskie's explication was an inadvertent misstatement. The Court disagrees. Senator Bayh's statement hardly contradicts Senator Muskie's explication. It is, rather, an accurate statement of a citizen-enforcer's remedies under the Clean Water Act with respect to injunctions and money damages—and simply does not address the circumstances when a citizen suit for civil penalties may be maintained.

Gwaltney also calls attention to occasional references in the legislative history to "abatement" actions. *See* S.Rep. No. 414, 92d Cong., 1st Sess. 79-82, *reprinted in* 2 *Legislative History* at 1497-1500. Such references, however, do not persuade the Court that abatement of continuing unlawful conduct was the only avenue of relief Congress contemplated when it authorized citizen suits under the Act. *See Student Public Interest Research Group of New Jersey v. Monsanto Co.*, 600 F. Supp. 1474, 1476 (D.N.J. 1985).

A reading of the citizen-suit provision that would authorize suits for civil penalties against polluters for past unlawful conduct regardless of their compliance status when the suit is filed is also consistent with one of the primary policy objectives inherent in the concept of citizen suits: deterrence of violations. Indeed, unless citizens may sue for civil penalties in such circumstances, citizen suits would provide little, if any, additional incentive for polluters to comply with their discharge limitations until a citizen suit is actually commenced. *See also Monsanto, supra*, 600 F. Supp. at 1476-77; *Sierra Club v. Aluminum Company of America*, 585 F. Supp. 842, 854 (N.D.N.Y. 1984).

If citizen suits under the Act were limited to situations where the polluter is engaged in unlawful conduct when the suit is filed, the deterrence effect of citizen suits would also be undermined by the evidentiary difficulties citizen enforcers would fact in establishing that a polluter is currently discharging unlawfully. As the Senate Report recognized, one of the keys to the successful functions of the Act's citizen suit provision is disclosure of a polluter's discharge information. *See* S.Rep. No. 414, 92d Cong., 1st Sess. 81 (1971) *reprinted in* 2 *Legislative History* at 1499 ("The information and other disclosure provisions required throughout the bill are important to the operation of this provision."). And, indeed, Gwaltney's DMRs form the basis of this lawsuit. But, as plaintiffs have pointed out, such reports are not available until at least a month—and sometimes more—after the discharge occurs. Gwaltney's proffered construction of the Act would engage the litigants in discovery battles over whether a polluter is no longer discharging unlawfully; and it would engage the courts in a search for standards to apply in determining whether a polluter's conduct can fairly be viewed as continuing in violation. *See Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 399 (5th Cir. 1985) (Williams,

J., concurring) (attempting to define what constitutes "in violation"); *Friends of the Earth v. Facet Enterprises, Inc.*, 22 Env. Rep. Cases 1143, 1145 n. 1 (W.D.N.Y. 1984) (". . . it is difficult for a plaintiff to verify that a violation is occurring at the very time that plaintiff is filing a notice of intent to sue. . . . I am not prepared to draw a line that Congress has not drawn, defining the point at which violations are sufficiently "recent" to form the basis for a citizen suit. To my mind, that line has been drawn already [by the relevant statute of limitations].") Such a situation would also be contrary to Congress's understanding that citizen suits involve "manageable and precise benchmarks for enforcement." S.Rep. No. 92-414, 1st Sess. 81 (1971), *reprinted in* 2 *Legislative History* at 1499.[8]

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[8] The problem of determining whether a violation is a "continuing" one is highlighted well in this case. Plaintiffs filed this suit in mid-June of 1984. With a history of violations of its TKN limitations in the wintertime, Gwaltney had just experienced another winter of repeated violations of its TKN limitations, despite the changes it had implemented in its wastewater treatment system to address the problem. At the time of trial in December of 1984, one of Gwaltney's own witnesses—Mr. Sneed—expressed doubt as to whether Gwaltney would meet its TKN limitations. It was not until Gwaltney had experienced a full winter without problems that it could make its motion to dismiss based on its present compliance, with a secure belief that it was indeed in compliance. Thus, plaintiffs' allegation in the complaint, that Gwaltney was continuing to violate its NPDES permit when plaintiffs filed suit appears to have been made fully in good faith. On these facts, the Court believes that even if Gwaltney were correct that a district court has no jurisdiction over citizen suits based entirely on unlawful conduct that occurred entirely in the past, the Court would still have jurisdiction here. A useful analogy is the manner in which the federal courts treat the jurisdictional amount requirement in diversity cases. Gwaltney has raised this analogy in support of its position that the Court is without jurisdiction here. The Court disagrees, and concludes that the analogy supports the position that it does have jurisdiction here.

In diversity cases, the question whether the jurisdictional amount is satisfied—and whether the court, ultimately, has jurisdiction—is

In light of the language of the Clean Water Act's citizen suit provision, its legislative history, and its underlying policy goals, the Court concludes that the Clean Water Act authorizes citizen suits for civil penalties for violations of the Act, regardless of whether the polluter is engaged in unlawful conduct at the time the suit is filed or afterward. A number of other courts have recently reached the same conclusion. *See, e.g., Monsanto, supra*, 600 F. Supp. at 1476-77; *Aluminum Company of America, supra*, 585 F. Supp. at 853-54; *Sierra Club v. Raytheon, supra*, 22 Env. Rep. Cases at 1054; *Student Public Interest Research Group of New Jersey v. Anchor Thread Co.*, 22 Env. Rep. Cases 1150, 1154 (D.N.J. 1984); *see also Student Public Interest Research Group of New Jersey v. Tenneco Polymers*, 602 F. Supp. 1394, 1398-99 (D.N.J. 1985); *Facet Enterprises, supra*, 22 Env. Rep. Cases at 1145 n.1.

Gwaltney is not, however, without authority for its position. It relies heavily on *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985). In that case, the Court of Appeals for the Fifth Circuit held that a person cannot maintian a citizen suit under the Clean Water Act unless the polluter's conduct is unlawful at the time the suit is filed, and cannot be brought

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not answered by whether the plaintiff ultimately recovers in excess of $10,000. *See, e.g.*, 14A C. Wright, A. Miller, E. Cooper, *Federal Practice & Procedure* § 3702 at 31-33, and cases cited (1985). Rather, the issue is whether the amount plaintiff *stated in the original claim* satisfies the amount, and is made in good faith. *See, e.g., Wiggins v. North Carolina Equit. Life Assur. Co.*, 644 F.2d 1014, 1016-17 (4th Cir. 1981). As Gwaltney recognizes, the test of good faith is whether it appears to be a "legal certainty" that the jurisdictional fact is not satisfied. *See St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938); *Wiggins, supra*, 644 F.2d at 1016-17. But there was no certainty here—legal, factual, or otherwise—that Gwaltney's system would correct one of the two major violation problems for which this suit was brought—until nearly one year after the suit was filed.

for civil penalties for past violations. *Id.* at 396. This Court, respectfully, disagrees.

First, the Court notes that the panel concluded the statutory language is not sufficiently ambiguous to raise any question about its proper meaning. *See id.* at 395. As discussed *supra*, however, this Court—and several others—have examined the language without being able to resolve its plain meaning with the same degree of certainty.

Second, the *Hamker* panel reasoned that because the statutory scheme centers primary enforcement responsibility with the states and the Administrator of EPA, citizens are not authorized to sue polluters unless the polluter is engaged in ongoing unlawful conduct. *Id.* at 395-96. But this Court does not comprehend how the conclusion necessarily follows from the premise. For, even if the statute is construed to allow citizens to sue for past violations, primary enforcement responsibility remains with the states and the administrator: generally, citizens must first notify the states, the administrator, and the alleged polluter and wait sixty days to give public enforcement authorities the opportunity to act before proceeding. *See* 33 U.S.C. § 1365(b)(1)(A). The panel also reasoned that because the statute requires the citizen-enforcer to notify the violator—as well as enforcement authorities—of its intent to sue, the statute contemplates that a citizen loses the right to sue if the violator brings itself into compliance before the sixty days elapses, just as the citizen loses the right to sue if the governmental authorities commence prosecution in a court before sixty days elapses. *Id.* at 396. This reasoning is unpersuasive. The statute expressly provides that public enforcement within the sixty-day period precludes a citizen suit, *see* 33 U.S.C. § 1365(b)(1)(B), but does not anywhere state that the violator's compliance within the sixty-day period deprives a citizen of the right to sue. It thus appears inappropriate to infer that compliance

by the violator carries the same consequences for citizen enforcement as initiation of a government enforcement action[9].

Finally, the *Hamker* panel reasoned that construing the provision to preclude citizen suits for civil penalties based on past violations would promote the goal of limiting the burden on the federal courts. But this Court is not persuaded that such a construction would ultimately reduce the federal judiciary burden. If such a construction were adopted, citizen suit provisions would provide an incentive for compliance only in those specific cases where the citizen-enforcer actually files a notice of intent to sue and then a complaint. The threat of citizen suits would have little general deterrent effect. It is not unreasonable to presume that under such a system, noncompliance would be more widespread than under a system where it is clear that citizens can sue for civil penalties for past violations. If the number of citizen suits is related to the level of noncompliance—a reasonable assumption—then it may well be that the number of suits actually filed per period of time would be greater under a system in which citizens cannot sue for civil penalties for past violations.

In considering the persuasiveness of *Hamker*, this Court also notes that the *Hamker* panel did not address the legislative history militating against its construction of the statute. As discussed *supra*, the legislative history corroborates the view that citizens can sue for civil penalties for past violations.

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[9] The Court also notes that the committee reports, as well as the statute itself, do not indicate that one of the purposes of the sixty-day notice requirement is to give a violator the opportunity to come into compliance and avoid liability. *See* H. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972), *reported in* 1 *Legislative History*, at 820; S. Rep. No. 414, 92d Cong., 1st Sess. 79-80 (1971), *reprinted in* 2 *Legislative History* at 1497-98. Rather, the sole purpose appears to be to "encourage and provide for agency enforcement." S. Rep. No. 414, 92d Cong., 1st Sess. 79 (1971), *reprinted in* 2 *Legislative History* at 1497.

Gwaltney also relies on *City of Evansville, Indiana v. Kentucky Liquid Recycling*, 604 F.2d 1008 (7th Cir. 1979), *cert. denied sub nom Louisville and Jefferson County Metropolitan Sewer District v. City of Evansville, Indiana*, 444 U.S. 1025 (1980). In that case, the Court of Appeals for the Seventh Circuit remarked that the Clean Water Act "does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past or for recovery of damages." *Id.* at 1014. That remark, however, insofar as it can be said to address citizens for civil penalties for past violations, is only *dicta*. The issue in the case was whether citizen suits may be brought for damages. The panel did not at all analyze whether the statute authorizes citizen suits for civil penalties for past violations.[10] The case of *Pawtuxet Cove Marina v. Ciba-Geigy Corp.*, 21 Env. Rep. Cases 1393 (D.R.I. 1984), which Gwaltney also cites, relies primarily on *City of Evansville* to reach its conclusion. *See id.* at 1394 (referring to cases cited in magistrate's decision, 21 Env. Rep. Cases 1390, 1391). Accordingly, the Court does not find the case to be persuasive.

Finally, Gwaltney relies on *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981). Gwaltney focuses on Justice Powell's

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[10] Plaintiffs argue that a case decided by the Court of Appeals for the Seventh Circuit subsequent to *City of Evansville* implicitly rejects the position with respect to citizen suits based on past violations that *City of Evansville* took. That case, *People of the State of Illinois v. Outboard Marine Corporation, Inc.*, 680 F.2d 473 (7th Cir. 1982), is not as on point as plaintiffs argue. The case does reflect the understanding that the United States can sue under the Clean Water Act for injunctive and other relief based on past discharges, regardless of a polluter's present compliance. *See id.* at 480-81. It also reflects the understanding that citizens may intervene in such cases. *Id.* at 480. It simply does not address the question whether citizens themselves can sue for civil penalties based on a polluter's unlawful conduct, that occurred entirely in the past, however.

observation that "this provision allows suits under the Act by private citizens, but authorizes only prospective relief. . . ." *Id.* at 6. This observation, however, like the remark of the Seventh Circuit in *City of Evansville*, arose in the context of whether a citizen enforcer may sue for damages. The Supreme Court, like the Seventh Circuit, concluded that one may not. Later in the opinion it did recognize that civil penalties are authorized in citizens suits. *See id.* at 14 n. 25. It had no occasion to consider or remark about whether a citizen enforcer may sue a polluter for civil penalties based on past violations.

III. Maximum Liability.

The number of days during which a polluter violates a limitation in its permit sets the polluter's maximum liability in civil penalties for violating that limitation. The subsection of the Clean Water Act authorizing civil penalties states that a polluter in violation of, among other things, permit limitations such as those forming the basis of this suit "shall be subject to a civil penalty not to exceed $10,000 per day of such violation." 33 U.S.C. § 1319(d). Determining the number of days involved in a given violation is thus an important aspect of assessing civil penalties. Determining whether, and in what circumstances, a polluter can be subjected to a penalty of greater than $10,000 per day for permit violations is also important. The parties dispute the law on both points.

A. Number of days involved for violating a monthly average. Gwaltney has violated its "monthly average" permit limitations for several substances on a number of occasions. The "monthly average" of a substance reflects the average amount (or concentration, where the substance is measured by concentration instead of by amount) of the substance discharged per day, based on an average of measurements taken for that substance over the course of a month. The monthly average for the pollutants at issue in this case is roughly half of the

maximum daily amount allowed.[11] Gwaltney argues that a violation of a monthly average constitutes a single day of violation. Plaintiffs, on the other hand, maintain that a violation of a monthly average constitutes thirty days of violation.

As discussed above, the relevant section of the Clean Water Act authorizing civil penalties reads that: "any person who violates . . . any permit condition or limitation . . . shall be subject to a civil penalty not to exceed $10,000 per day of such violation." 33 U.S.C. § 1319(d). Thus, to determine the maximum authorized penalty for the violation of a monthly limitation, the Court must consider how many days are involved in such a violation. It is difficult for this Court to imagine how the violation of a monthly limitation involves any number of days other than the number of days in that month. Violating a monthly limitation, then, subjects a polluter to a maximum penalty of $300,000. Similarly, a violation of a weekly limitation would, it seems, necessarily involve seven days. At least one other district court has reached the same conclusion. *See United States v. Amoco*, 580 F.Supp. 1042, 1045 (W.D. Mo. 1984).

Although it cites neither cases nor legislative history in support of its position, Gwaltney contends that this conclusion is nevertheless wrong primarily because it be-

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[11] The average and maximum permit limitations for four of the pollutants at issue in this case read as follows on Gwaltney's DMR for May, 1984: (i) for TSS: 228.000 KG/D (daily average over a month), 455.000 KG/D (daily maximum); (ii) for fecal coliform: 200.0000 N/CML (daily average over a month), 400.000 N/CML (daily maximum); (iii) for TKN: 109.0000 KG/D (daily average over a month), 219.0000 KG/D (daily maximum); (iv) for oil and grease: 78.0000 KG/D (daily average over a month), 156.0000 KG/D (daily maximum). For chlorine, (Cl_2), there was no average limitation: rather, a daily minimum (1.5000 MG/L) and maximum (2.5000 MG/L) were set.

lieves it can be unjust.[12] To illustrate its point, Gwaltney suggests a hypothetical: a polluter discharges, for twenty-nine days of a month, 98% of the amount that it must average each day in order to meet its monthly average; on the last day, however, the polluter discharges 180% of that amount. Because of the last day's discharge, the polluter would violate its monthly average; yet, if its permit allowed a daily maximum twice as great as the monthly average (as Gwaltney's does), the polluter would not have violated its daily maximum for the substance at all during the entire month. In Gwaltney's view, subjecting the polluter to thirty days' liability because of the monthly violation is unjust, especially in light of the fact that the polluter never exceeded its daily maximum.

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[12] Gwaltney raises two other arguments against treating the violation of a monthly limitation as a thirty-day violation.

First, Gwaltney contends that to characterize a violation of a monthly limitation as thirty days of violation is contrary to the principle that penal statutes are to be construed strictly. *See, e.g., Commissioner of Internal Revenue v. Archer*, 361 U.S. 87, 91 (1959). Adhering to this proposition does not affect the Court's conclusion. The words of the statute authorize a penalty of up to $10,000 "per day of such violation." Because a violation of a monthly limitation necessarily involves a violation over an entire month, a maximum penalty of $10,000 per day of the month is plainly within the words of the statute and therefore does not violate any principal of strict construction.

Second, Gwaltney argues that one of the stipulations, in conjunction with the plaintiffs' response to an interrogatory, precludes plaintiffs from arguing that Gwaltney's violation of a monthly limitation subjects Gwaltney to a penalty for every day of the month. The parties stipulated that 160 violations had occurred, and plaintiffs had indicated in response to an interrogatory that "the total dollar amount of civil penalties" they would seek would be "$10,000 per violation." Some of the violations that were stipulated were, of course, violations of monthly limitations. Gwaltney is correct that plaintiffs now take a position on penalties that is technically inconsistent with their interrogatory response because they said "$10,000 per violation" instead of "$10,000 per day of each violation." But such an event, parties' responses to interrogatories do not preclude this Court from imposing appropriate penalties.

The Court disagrees. Part of Gwaltney's argument is based on the suggestion that no real harm is being done where maximum daily limitations are not violated. But the mere fact that a daily maximum is not violated does not mean that the polluter's discharges are harmless. Daily maximums for the pollutants at issue are no doubt more lenient than the monthly average because the environment may be able to absorb a relatively high discharge in a single day without incident—while a substantially lower discharge over the course of a month may present an environmental problem. In any event, the water pollution authorities have established the allowable discharge levels for various time intervals in order to ensure that water quality standards are met. It is not for the district court to decide, in a citizen suit proceeding, that a permit limitation an agency has fixed is unnecessary.

Another part of Gwaltney's argument is based on the fact that only on one day did its hypothetical polluter exceed the amount that it needed to maintain each day in order to meet the month's average. But this too is unpersuasive. The average is based on discharges over the entire month. When a polluter violates a monthly average, every day of its discharges contributes to the violation, even if most of the discharges are within the average that the polluter needs to maintain in order to stay within the monthly limitation.[13]

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[13] Gwaltney also suggests that its violations of a monthly average cannot be presumed to be a violation during every day of the month, because the average may be computed based on measurements taken less frequently than every day. The Court recognizes that Gwaltney's permit requires it to monitor many of its discharges only three days per week, rather than every day. But even though those periodic tests do not establish with absolute certainty that Gwaltney's actual monthly average exceeded the permitted amount, it is nevertheless reasonable to presume that they do establish such a monthly violation—especially in light of Gwaltney's failure to introduce more accurate evidence to the contrary.

The problem with Gwaltney's position is further illustrated when one considers a counter-hypothetical: the polluter nearly exceeds—but does not pass—its daily maximum every day of a month. Such a polluter would far exceed the monthly average, and would be liable for violating that limitation. But Gwaltney's position, if adopted, would constrain a court to treat such conduct as one single day of violation, thereby preventing a court from imposing over $10,000 in penalties for a full month of substantial discharges. Such a limitation does not strike this Court as a sensible one, much less as consistent with the statute.

Ultimately, the district court has discretion to determine the appropriate penalty under Section 1319(d) for a day of violation. As the district court noted in *Amoco*, merely because a polluter is subject to $300,000 in penalties for violating a monthly standard does not necessarily mean that those penalties will be imposed. *See Amoco*, *supra*, 580 F. Supp. at 1045. The $300,000 is a maximum penalty under the statute, not a mandatory one. *See* 33 U.S.C. § 1319(d). Thus, the district court can consider any appropriate factors in arriving at a penalty. But it ought not to have its hands tied, when crafting a penalty for a violation of a monthly limitation, by a $10,000 limit.

B. Maximum penalty per day where multiple violations occur within a day. In some instances, Gwaltney violated discharge limitations for several substances on the same day. Gwaltney argues that the Clean Water Act limits its liability to $10,000 per day, regardless of the number of its violations on a given day. Plaintiffs, on the other hand, argue that the Act only limits a permittee's liability to $10,000 per day per violation of the discharge limitations on a given substance.

The relevant statutory provision states that:

> Any person who violates . . . any permit condition or limitation [implementing any of several enumer-

> ated section of the Clean Water Act, in a permit such as Gwaltney's NPDES permit] . . . shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

33 U.S.C. § 1319(d). There is no question here that Gwaltney's NPDES permit is a type of permit encompassed under this subsection. Nor is there any question that all of the limitations at issue in Gwaltney's permit are limitations implementing sections of the Clean Water Act enumerated in Section 1319(d). The parties merely dispute the proper construction of the phrase "$10,000 per day of such violation."

Gwaltney relies on *United States v. Detrex Chemical Industries, Inc.*, 393 F. Supp. 735 (N.D. Ohio 1975). In that case, the district court rejected the view that 33 U.S.C. § 1319(d) can be read to authorize "$10,000 per violation per day." *Id.* at 738. The district court first concluded that the statutory language is ambiguous. *See id.* at 736. It next reviewed the legislative history and found references to the Act's authorizing penalties up to "$10,000 per day" and "$10,000 per day of violation," without any use of the words "of such violation." *See id.* at 737. It also concluded that $10,000 per day as an absolute maximum provides an adequate deterrent, and is consistent with other provisions of the Clean Water Act. *See id.* at 736-37.

Plaintiffs suggest that the appropriate reading of Section 1319(d)—and what the *Detrex* court intended— was that Section 1319(d) establishes a maximum daily penalty of $10,000 for violating the limitations on any given *substance*, not an absolute daily maximum. For example, if a polluter violates its limitations for fecal coliform as well as for TKN on the same day, it is subject to a maximum civil penalty of $20,000, not $10,000. On the other hand, if the polluter violates two different limitations—such as the monthly average and the daily maximum—for TKN only, on a given day, it is subject to no

more than $10,000 in civil penalties for that day of violation. They rely on *dicta* in a recent district court case, *United States v. Amoco Oil Co.*, 580 F. Supp. 1042, 1046-47 n.1 (W.D. Mo. 1984) to support their belief that the *Detrex* holding can be harmonized with this construction of Section 1319(d), and that this construction is indeed the correct one. In *Amoco*, the district judge remarked that "a good argument can be made for the idea that violations of the daily limit for two or more *different effluents* should be subjected to separate penalties." *Id.* at 1047 n.1 (emphasis original).

The Court does not believe that *Detrex* can be harmonized with the plaintiffs' and the *Amoco* court's construction of Section 1319(d). Indeed, the district judge in *Amoco* acknowledged that "there are indications" that *Detrex* cannot be harmonized with his own (and plaintiffs') proffered construction. *Amoco*, *supra*, 580 F. Supp. at 1047 n.1. In order to harmonize the two, plaintiffs correctly point out that the reported opinion in *Detrex* does not indicate whether the multiple violations per day that were at issue involved the same substance or different ones. They suggest that the "multiple per day violations" that the case addressed may have involved repeated violations on the same day of an hourly limitation for a single substance. This may be true, of course. But whether or not the facts were as limited as plaintiffs suggest, the *Detrex* court clearly contemplated the issue in terms of an absolute maximum penalty per day, regardless of whether the limitations violated were for the same or different substances:

> . . . a $10,000 per day civil penalty, regardless of the number of violations of § 1311, 1312, 1316, 1317, or 1318 of Title 33 or of any permit condition or limitation or of any order of the E.P.A. more than adequately effectuates the Congressional purpose of a "real" threat of sanction.

Detrex, *supra*, 393 F. Supp. at 738.

The Court concludes that the *Detrex* court's construction is the appropriate one. Section 1319(d) authorizes a maximum of $10,000 per day in civil penalties for violations that are enumerated therein, even where the defendant has violated discharge limitations for several substances during the same day.

In view of the contrary suggestion in *Amoco*, it may be helpful to explain the Court's reasoning further. As the *Detrex* court remarked, the statute itself is ambiguous. To elaborate on this, the words "$10,000 per day of such violation" may be read, as plaintiffs would suggest, to mean "$10,000 per day per each violation." On the other hand, the words may also be read as indicating how the number of days for a maximum civil penalty of $10,000 can be imposed should be computed: that is, to clarify that the maximum civil penalty may be imposed for each day of an enumerated violation—rather than, for example, being limited to the day on which a violation is reported, or to the day on which the Administrator gives an order that the defendant violates, or to the days on which the defendant violates some provision of the Clean Water Act beside the enumerated ones. All of these alternate readings may have been at least arguable if the statute had ended with the words "$10,000 per day," omitting the words "of such violation."

In view of the ambiguity in the statute itself, the *Detrex* court examined the legislative history and found several indications that Congress intended to authorize an absolute daily maximum. *See Detrex, supra*, 393 F. Supp. at 737. The Court need not elaborate further on this point, nor on the other reasons for this construction that *Detrex* discusses. Plaintiffs do not raise any persuasive reasons for choosing their construction over the one that Gwaltney has offered and that the *Detrex* court and this Court find to be correct. Their primary argument is based on the language of Section 1319(d) itself and the fact that the *Amoco* court, in *dicta*, suggested the

same reading based on that language. As the Court has already demonstrated, however, that language is amenable to various other readings as well. Plaintiffs provide no legislative history in support of their position. And their primary policy argument is that deterrence is better effectuated by their position. This, however, is unclear. A maximum penalty of $10,000 per day may amount to a substantial deterrent against violations by even the largest corporations where more than a few days of violation are involved, as will be come clear *infra*. The Court is satisfied that its construction of Section 1319(d) accurately reflects the intent of Congress.

C. Maximum civil penalty applicable to Gwaltney. In light of the foregoing principles for calculating days of violation, the Court is now able to determine the number of days for which Gwaltney is, in its view, subject to a $10,000 maximum penalty. The parties have stipulated to the number of violations, based on Gwaltney's DMRs from November, 1981 to August, 1984. Copies of the DMRs themselves are also in evidence. The DMRs reflect which of the stipulated violations involve monthly limitations, and which ones involve daily limitations. The Court has summarized Gwaltney's violations in Appendix A.

During twenty-two of the thirty-three months for which are in evidence, Gwaltney violated the monthly average for at least one substance. During these same months, Gwaltney almost always violated more than one daily maximum or monthly average limitation. But under the principles discussed above, Gwaltney is subject to no more than $10,000 per day of violation, regardless of how many violations occurred on that day. There were 653 days in those tweny-two months;[14] thus, there were

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[14] Actually, a total of 669 days are in the twenty-two months involved. The parties have stipulated, however, that during the last of those 22 months—May, 1984—no violations occurred after May 15. Accordingly, the Court has treated Gwaltney's violation

653 days of violation. For those days of violation, Gwaltney is subject to a maximum penalty of $6,530,000.

In addition, Gwaltney violated daily limitations during five months when it reported no violation of monthly averages. In July 1982 it violated two limitations; it also violated two limitations during each of the three months following. Finally, Gwaltney violated five daily maximum limitations in February, 1984, making a total of 13 violations of daily standards during months when no violations of monthly averages occurred.

The DMRs do not indicate on which day of the month a given violation occurred, however. Therefore, it is impossible for the Court to discern whether any of these daily violations occurred on the same days. Conceivably, there were as few as seven different days of violation.[15] Plaintiffs have not demonstrated that each of these thirteen violations of daily standards occurred on different days.

The Court nevertheless believes that it is reasonable to presume that each of these did occur on a different day. Gwaltney has contended throughout this litigation that it is subject to a maximum penalty of $10,000 for a given day of violation, regardless of how many violations oc-

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of its May, 1984 monthly average for TKN as involving only 15 days of violation.

[15] In July 1982, for example, there was one fecal coliform violation and one chlorine violation. Those violations could have occurred on the same day, because tests for fecal coliform were performed three times per week, and tests for chlorine were performed hourly, according to the DMRs. Each of the two reported chlorine violations in August, September, and October, 1984, could have occurred on the same day because chlorine was tested on an hourly basis.

In February 1984, the single TKN violation and the two fecal coliform violations could have occurred on the same days as the three oil and grease violations. Tests for all three substances were performed three days per week, according to the DMRs.

curred on that day. Gwaltney also has complete access to any relevant records, so that it could have presented evidence to show that any of the violations occurred on the same day, if such evidence indeed existed. In the absence of such evidence, the Court concludes that Gwaltney's violations during those five months occurred on thirteen different days. These violations increase Gwaltney's maximum liability in civil penalties by $130,000. Adding this to the maximum penalty for the months when Gwaltney violated monthly standards, $6,660,000 is the maximum civil penalty to which Gwaltney is subject.

IV. Gwaltney's Penalty.

As the Court has already discussed, the penalty of $10,000 per day of violation authorized by Section 1319 (d) is a maximum penalty, not a mandatory one. The Court now faces the task of determining the actual penalty, within the statutory limits, that Gwaltney shall be assessed. The parties differ markedly on this point. Plaintiffs urge the Court to impose the statutory maximum: here, as the Court has discussed, over $6,000,000. Gwaltney argues that a far smaller amount ought to be assessed: somewhere between $12,000 and $20,000.

Despite their widely varying estimates of the appropriate penalty, the parties agree that the United States EPA's civil penalty policy, *see* Environmental Protection Agency Civil Penalty Policy, [Federal Laws] *Env't Rep.* (BNA) 41:2991 (June 1, 1984) (hereinafter cited as "EPA Penalty Policy"), is an appropriate guideline for determining the amount of Gwaltney's penalty. Neither of the parties argue that the policy binds the Court. Nor indeed does it. Nevertheless, both parties suggest—and the Court agrees—that EPA's penalty policy provides a helpful analytical framework for arriving at a civil penalty. It would have nothing to lose by non-compliance because a penalty for their violations would make them no worse off than if they had complied in a timely way.

See id. The policy suggests that the gravity component reflect both the seriousness of the violation and—where extensive non-compliance with a regulatory program exists in an area—an additional amount to promote general deterrence purposes. *See id.*

Once an appropriate penalty for deterrence purposes has been estimated, the policy recommends that this "preliminary deterrence amount" be adjusted to ensure that the "regulated community" is fairly treated. *See* EPA Penalty Policy at 41:2992. The policy identifies a variety of factors that ought to be accounted for in arriving at a final civil penalty. Such factors include the degree of willfulness or negligence involved, the degree of cooperation involved, the violator's history of non-compliance, and whether the penalty would force the violator out of business. *See* EPA Penalty Policy at 41:3000-02.

B. Gwaltney's violations. Although the parties have stipulated to over 160 different violations involving five different substances, the Court shall consider two distinct compliance problems in arriving at Gwaltney's penalty. Each problem related to a specific pollution control method at the plant. Inadequacies in one method or the other account for virtually all of the violations at issue here.

1. Chlorination problems. From November, 1981 to October, 1982, Gwaltney experienced problems with its chlorination process. These problems caused Gwaltney's violations of its fecal coliform and chlorine limitations during that time. Fecal coliform, a type of microbe associated with human and animal feces, is a good indicator of the safety of water for drinking, swimming, and shellfish harvesting. Gwaltney's permit includes both monthly average and daily maximum limitations on its discharges of fecal coliform. Chlorine is a toxic chemical that the state requires Gwaltney to use—in appropriate concentrations—to kill fecal coliform. Chlo-

rine also kills other life forms where its concentration is high enough, however. Thus, Gwaltney's NPDES permit imposes daily maximum as well as minimum limitations on the concentration of its chlorine discharges. From July, 1981 (before Gwaltney bought the plant) until October, 1982, the plant chronically violated its permit limits for fecal coliform and chlorine. These violations were due to both insufficient and excessive exposure of Gwaltney's waste-water to chlorine.

Gwaltney knew that its plant had a chlorine problem prior to purchasing the plant from ITT-Gwaltney in October, 1981. ITT-Gwaltney had taken the initial step of purchasing a new chlorinator, which Gwaltney believed would correct the chlorine and fecal violations. After a period of nearly one year from the takeover date, Gwaltney finally resolved the chlorination problems at its plant. At no time did Gwaltney seek outside assistance from independent consultants in analyzing the causes or the extent of its chlorination problems.

a. *Economic benefits.* The Court first considers the economic benefits that accrued to Gwaltney as a result of the delay in the plant's having a chlorination system that would meet the chlorine and fecal coliform limitations. The Court feels compelled to ensure that Gwaltney receives no economic benefit whatever from its delay in having a properly operating chlorination system.

Determining with precision a firm's economic benefit from noncompliance is not a simple matter. As EPA's penalty policy points out, there are at least three distinct types of economic benefits that a violator may enjoy as a result of its violation. *See* EPA Penalty Policy at 41:2996-97. First, by delaying the expenditure of funds on compliance, a violator obtains the use of the money for other purposes in the meantime. Second, a violator may also avoid some costs altogether—for example, the costs of maintaining and operating the pollution control sys-

tem until it is implemented. Third, a violator may, in addition, obtain a competitive advantage as a result of its violation—for example, it may be able to offer goods at a lower price, thereby possibly increasing its sales and profits. While these different types of benefit are not difficult to understand in the abstract, determining their amounts is more complicated. Indeed, proving the extent of some of these types of economic benefits will often be impossible; thus, any objective formulation of economic benefit is likely to underestimate that benefit. The Court need not painstakingly determine such an amount, however. The purposes behind including an economic benefit component in a penalty assessment are to ensure that the violator disgorges at least its economic benefit, while also providing some objective basis for at least part of the penalty asessment. In light of these purposes and the difficulty of demonstrating all elements of economic benefit, the Court shall incorporate any objective evidence to arrive at what it hopes is a rational estimate of Gwaltney's economic benefit, resolving uncertainties in favor of a higher estimate.

Gwaltney offered evidence addressing primarily the first type of economic benefit: the benefit accruing from delaying its expenditures. Gwaltney indicated that its net cost for the changes in the chlorination system was $11,560. This amount is undisputed. In order to determine Gwaltney's economic benefit from delaying its expenditure, one must also know the length of the delay and the value of not incurring that expenditure.

Gwaltney attempted to demonstrate at trial that it could not have implemented the necessary improvements in the chlorination system any more than four months earlier than it actually did. Gwaltney argues that its economic benefit from delay should therefore be computed based on this four-month period. The Court, however, believes that the period of benefit for computing the economic benefit of delayed compliance should run for the

entire time during which the violator is out of compliance because of its chlorination problems: here, twelve months. The Court recognizes, of course, that Gwaltney could not have accomplished the necessary changes instanteously upon discovering the chlorination problems. Indeed, Gwaltney's suggestion that six months was an appropriate, reasonable period for implementing a fully complying chlorination system may be correct. But this does not change the fact that if the expenditures had been made in time to prevent any violations at all, then Gwaltney would have incurred all the expenditures prior to the noncompliance period.[16] The Court also notes that its approach for computing the benefit period comports with that of the EPA's penalty policy. *See* EPA Penalty Policy at 41:2996.

Gwaltney argues that its actual rate of interest on borrowed funds during this period should be used to calculate its economic benefit from delayed compliance. It adduced evidence that during the relevant period this rate was 13%. Plaintiffs, on the other hand, computed Gwaltney's economic benefit from delay using a rate of 18.17%, which is the ten-year rate of return on equity earned by Smithfield Foods, Inc.—Gwaltney's parent corporation. At least in these circumstances, the Court believes that 13%—the actual interest rate Gwaltney itself paid on borrowed funds—is a more accurate basis for determining Gwaltney's economic benefit from delay.[17]

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[16] The fact that in the circumstances of this case another firm --ITT-Gwaltney, rather than defendant—owned the plant at the time such expenditures would have been incurred does not alter this conclusion. Presumably the cost of such improvements would have been reflected in the sale price that defendant would have paid for the plant.

[17] Plaintiffs cite *Ohio ex rel. Brown v. Dayton Malleable, Inc.*, 13 E.R.C. 2189, 2194 (Ohio Ct. C.P. 1979), *aff'd*, 438 N.E. 2d 120 (Ohio 1982), for the proposition that the historic return on equity is the appropriate rate. But in that case, which involved penalty assessments under an Ohio water pollution statute, appar-

Given Gwaltney's rate of interest, its period of delay compliance because of chlorination problems, and the amount of investment involved, the Court can determine at least the portion of economic benefit accruing to Gwaltney because of the delay in expending funds on the chlorination system. That amount is approximately $1,500.[18] While this amount is probably less than Gwaltney's total economic benefit, the Court has no basis for rationally arriving at a figure any larger. In view of the rest of the penalty that Gwaltney shall be assessed, however, the Court has no doubt that Gwaltney shall disgorge any economic benefit of its non-compliance.

b. *Gravity component.* Gwaltney argues that there is no reason to impose a penalty with an adjusted gravity component of more than $4,900. Gwaltney's suggested

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ently no one contended that the defendant's own rate of interest ought to be used. Rather, the choice before the Court was between the polluter's actual rate of return and "some outside standard." *Dayton Malleable*, 13 E.R.C. at 194. The Court rejected the latter. Here, plaintiffs' proposed rate—not the rate proposed by Gwaltney—is more accurately described as the "outside standard": it is based on the parent's rate of return; not Gwaltney's; and it runs over a ten-year period, not the years in question.

[18] Gwaltney's annual rate of return (13%) multiplied by the amount of investment involved ($11,560) multiplied by the number of years of non-compliance (1.0).

In its proposed calculations, Gwaltney, like the Court, calculates its benefit from delay on the entire amount of investment involved: $11,560. Gwaltney claims that this is a generous concession on its part, because the money was actually expended over the course of the improvements, which while the calculation is based on the fiction that the money was spent in a lump sum at the end of the improvements—facilitating the computation but distorting the reality. The Court agrees that a fiction is involved, but disagrees that it distorts Gwaltney's economic benefits from delay. If the expenditures had been incurred in time to improve the system before the violations occurred, it is reasonable to presume that each of the expenditures would have been incurred about a year before it was actually incurred. Thus, it is appropriate to calculate Gwaltney's benefit on the entire amount expended based on one year's time.

gravity component covers all the violations at issue in this case, including its violations resulting from its chlorination problems.

The actual and potential environmental harm associated with a violation is an important factor, under the EPA's penalty policy, in arriving at the gravity component. *See* EPA Penalty Policy at 41:2999. The Court agrees. In connection with the environmental harm of its fecal coliform violation, Gwaltney recognizes that the presence of fecal coliform has led the state to generally prohibit the taking of shellfish for human consumption from much of the Pagan River. Gwaltney attempts to minimize the seriousness of its fecal coliform violations, however, by pointing out that the state—in certain circumstances—nevertheless allows oysters and clams from those same parts of the Pagan River to be sold for human consumption in their uncooked state. Further, Gwaltney argues that the Pagan River's condition with respect to fecal coliform could not be improved for shellfish harvesting even if Gwaltney constantly complied with the fecal coliform limitations in its permit. Gwaltney also attempts to minimize the seriousness of its fecal coliform violations by noting that the State has not absolutely forbidden the discharge of fecal coliform; rather, the State has only limited such discharge.

In the Court's view, Gwaltney trivializes the seriousness of its fecal coliform violations. To begin with, an EPA summary of the effects of the fecal coliform indicates that increased levels of fecal coliform in waters used for recreational swimming and shellfish harvesting pose health hazards to human beings, and act as a medium of disease transmission for a variety of diseases.[19] In light of this, the Court finds Gwaltney's characterization of its violations as posing "no threat what-

[19] This EPA summary is a joint exhibit to which the parties stipulated.

ever to the public health" to be nothing less than offensive.

Further, the Court notes that Gwaltney's fecal coliform violations were not *de minimus*. Gwaltney violated its daily maximum—by four to seven times the permitted amount—on at least six occasions, according to the DMRs; and during five out of the seven months when Gwaltney exceeded its monthly average for fecal coliform, it exceeded the monthly average by 58% to 150%. Finally, the Court notes that Gwaltney experienced fecal coliform problems almost continuously from November, 1981 to July, 1982. It is true, of course, that the Pagan River was not a virgin stream before Gwaltney exceeded its permit limitations for fecal coliform; Gwaltney's fecal coliform violations were not responsible for spoiling the river. But the fact that a river already suffers from poor water quality hardly excuses a polluter's violation. Indeed, in view of the fact that the Clean Water Act aims to restore the waters of the United States as well as to prevent the degradation of unpolluted waters, *see* 33 U.S.C. § 1251, violations that impede the restoration of water quality ought not to be treated lightly. Considering all these factors, the Court believes that the "gravity component" of Gwaltney's penalty should include $4,000 per day of fecal coliform violations arising out of Gwaltney's chlorination problems. A total of 213 days are involved.[20]

Gwaltney's problems with its chlorination system resulted in violations of its chlorine standards as well as of its fecal coliform standards. The parties have stipulated that at least half of Gwaltney's 34 chlorine violations involved minimum standards, however, not maxi-

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[20] Gwaltney violated its monthly average for fecal coliform in November and December, 1981, and from February to June, 1982; it also violated daily maximums on one occasion in January, 1982 and on one occasion in July, 1982. This amounts to 213 days of violation.

mum ones. The only possible harmful environmental effect from violating a minimum chlorine standard, according to the evidence, is that fecal coliform limitations may be exceeded. The Court has already considered the environmental harm from Gwaltney's fecal coliform violations. It sees no reason to increase the gravity component because of Gwaltney's violations of its minimum chlorine standards.

Gwaltney's violations of its maximum chlorine standards are a different matter, though. Chlorine is a toxic pollutant, and in certain concentrations kills a variety of marine life. Gwaltney correctly points out that it is required to use chlorine in its waste-water treatment and has even been required to maintain a minimum level of chlorine in its effluent. Gwaltney also points out that apparently no fish kills on the Pagan River occurred during the entire period of its noncompliance. The Court nevertheless believes that a non-trivial amount should be added to the gravity component of Gwaltney's penalty to account for its chlorine violations. The gravity component should account for risk of environmental harm as well as for any actual environmental harm. During ten of the twelve months when Gwaltney experienced problems with its chlorination system, it exceeded its maximum chlorine limitations on some seventeen occasions. Although most of these violations were not grossly excessive,[21] two involved discharges that were double the permitted concentration. Considering these factors, the Court deems it appropriate to include in the gravity component of Gwaltney's penalty an amount of $1,000 for each of the seventeen days of violation of its maximum chlorine limitation.

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[21] Gwaltney's permit allowed discharges with a maximum chlorine concentration of 2.5 mg./l. and a minimum of 1.5 mg./l. It appears that 11 of Gwaltney's 17 violations of its maximum chlorine limitations involved discharges with a chlorine concentration under 3.2 mg./l.

c. *Adjustments.* Gwaltney argues that its penalty ought to be adjusted downward to account for a variety of factors. Under EPA's civil penalty policy, a violator's willfulness or negligence—or lack thereof—is one factor to consider in arriving at a final penalty amount. *See* EPA Penalty Policy at 41:3000. Of course, liability under Section 1319(d) is strict. *See, e.g. United States v. Amoco, supra,* 580 F. Supp. at 1050. But willfulness is nevertheless relevant to the amount of penalty. *See id.*

Gwaltney argues that its conduct should not be characterized as willful merely because it did not shut down its facility in the face of admitted knowledge that chlorination problems at its plant were causing permit violations even before Gwaltney took over the plant. In support of that proposition, Gwaltney suggests that it had no "absolute statutory obligation" to close its plant or slow its production, absent "imminent and substantial endangerment to health or welfare." Gwaltney's premise does not support its conclusion, however. Even if it had no "absolute statutory obligation" to close its plant or slow its production, Gwaltney's failure to take any such measures, in the face of undisputed knowledge that continued operation would result in continued violations, reflects a certain degree of willfulness. The Court need not decide whether it is the sort of willfulness that ought to result in an increased penalty, though, because the evidence reflects that Gwaltney dealt with its chlorination problems in an exceedingly unconcerned manner. While Gwaltney may not have had any control whatever in the chlorination problem's first arising, it did exercise considerable control over the time involved in correcting that problem, and its attitude borders on benign neglect.

The first shipment of parts for the new chlorinator that Gwaltney believed would solve its problems did not arrive until December, 1981; yet, the problem had arisen in August, and ITT-Gwaltney had ordered the parts in

September. The record does not reflect any effort by Gwaltney to speed up the arrival. A crucial component for maintaining the proper chlorine flow—an automatic valve—was missing from the December shipment and had to be back-ordered; this part did not arrive until March 16, 1982. The record does not reflect any efforts by Gwaltney to speed up this arrival, either. Every witness who was asked indicated that the chlorination problems arising from the lack of an automatic valve could have been handled manually. It would not have been easy—but it was possible. The record does not reflect any special effort by Gwaltney to control the problem manually. Further, Gwaltney's engineers suspected—correctly, as it turned out—other problems with the chlorination system besides the chlorinator itself. A supplier first sent the wrong dyes for testing those suspicions. Gwaltney did not obtain the proper dyes until ten days later, despite virtually uncontradicted testimony that the necessary dye is commonly available. Through all this, Gwaltney did not seek any outside advice to assist it in determining the precise nature and extent of its chlorination problems.

Contrary to Gwaltney's contentions, the Court believes that Gwaltney's penalty ought to be increased, not reduced, because of willfulness. Gwaltney's lackadaisical approach in correcting a problem that posed risks—albeit not "imminent" ones—to both human health and aquatic life should not be countenanced. One may speculate how long Gwaltney would have taken to repair a machine the faulty operation of which would have halted production. It is reasonable, in the Court's view, in conclude that at the very least Gwaltney would have exerted more effort to repair such a machine than it did to bring its discharges into compliance with pollution standards. Gwaltney acknowledges that the evidence supports the conclusion that it could have reduced the compliance time by 125 days. The Court agrees, and shall increase the penalty

by $1,000 per day that Gwaltney could have eliminated in correcting the problem.

Gwaltney argues that its penalty should also be reduced because of its cooperation in controlling its chlorination problem.[22] It is apparently true that Gwaltney corrected its chlorination problems without the threat of a lawsuit from anybody to prod it along. In that sense, Gwaltney was not uncooperative. But the Court finds it inappropriate to give Gwaltney credit for correcting violations for which Gwaltney plainly knew it was responsible.

Gwaltney's final argument for reducing any penalty it will be assessed is its purported inability to pay a substantial penalty. EPA's penalty policy is, generally, not to request a penalty that is "clearly beyond the means of the violator." *See* EPA Penalty Policy at 41:3002. Gwaltney characterizes its own "profit margin" as "extremely thin." It suggests that its penalty should be fashioned in light of this fact. The Court disagrees, being unpersuaded that any penalty warranted by Gwaltney's violations would jeopardize Gwaltney's continued operation.[23]

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[22] Gwaltney also suggests that its cooperation is reflected by its self-reporting of violations, and intimates that under EPA's penalty policy this should result in a mitigation of its penalty. Gwaltney is legally required to report its violations, however *see supra* note 3. Thus, the Court shall not mitigate Gwaltney's penalty on account of its self-reporting. This approach accords with EPA's policy. *See* EPA Penalty Policy at 41:3000 ("*assuming such self-reporting is not required by law,* such behavior should result in the mitigation of any penalty.") (emphasis added).

[23] Although Gwaltney's income statement for the year ending April 29, 1984, reflects an after-tax loss of $247,000, this loss must be considered in light of Gwaltney's extraordinary loss during the same year of 1.8 million dollars on the disposition of a plant. Gwaltney is clearly earning a substantial dollar amount on its operations, regardless of whether its profit margin is "thin."

In light of Gwaltney's economic benefit, the gravity component, and appropriate adjustments, Gwaltney's total penalty for the violations arising out of its chlorination problems is $995,500.[24]

2. *Biological treatment system.* Gwaltney's second source of compliance problems was its biological treatment system. Inadequacies in that system led to repeated violations of Gwaltney's TKN limitations during the winter months early in 1982 and the winter months of 1982-83. Gwaltney also experienced violations of its permit limitations for TKN and other substances during the winter and spring of 1983-84, in connection with the start-up of its new biological treatment system.

TKN is a nitrogen compound that can degrade a river by depleting its oxygen supply. Natural chemical and biological processes, involving TKN and bacteria in the river, transpire after TKN is added to a river. Those processes consume the dissolved oxygen in a river, to the detriment of many forms of river life. Gwaltney knew before it purchased the plant that its biological treatment system had resulted in TKN violations the previous winter. It did not take any steps of its own to address the problem until later May, 1982—well after it experienced TKN violations during the first winter that it was operating the plant. Over the following two years, in conjunction with the advice and approval of a consulting

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[24] This amount is computed as follows:

—economic benefit:	$ 1,500
—gravity-fecal coliform ($4,000 x 213 days of violation):	852,000
—gravity-chlorine ($1,000 x 17 days of violation of maximum limit):	17,000
—adjustment for delay ($1,000 x 125 days of delay):	125,000
	$995,500

firm and the State Water Control Board (SWCB), Gwaltney devised and implemented a variety of changes in its biological treatment system. It submitted a proposed plan to the SWCB on January 5, 1983, which the SWCB approved on May 31 of the same year. By mid-October, construction was completed. Although Gwaltney experienced a number of violations during the system's start-up period, it experienced no violations after May 15, 1984, up to the time of trial in mid-December, 1984. Some experts did testify, though, that they were uncertain whether the new system would meet the permit limitations for TKN during the remainder of the winter.

a. Economic benefit. As with its chlorination system, the only evidence about Gwaltney's economic benefit from non-compliance concerns the value of delaying the necessary expenditures. Gwaltney's evidence is that its expenditure amounted to $159,745. The Court's computation of Gwaltney's economic benefit shall be based on this amount.[25]

The period over which a violator's economic benefit should be computed runs from the date of non-compliance

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[25] Plaintiffs argue that Gwaltney's benefit from delayed expenditures should be based on a much larger amount. They point out that Gwaltney's consultants outlined a "permanent solution" to Gwaltney's biological treatment problems, at an estimated cost of $506,000, and that Gwaltney chose instead to implement a modified version of the "interim solution," which was considerably less expensive. Plaintiffs argue that Gwaltney's economic benefit constitutes the difference between the "permanent solution" and the amount Gwaltney actually expended.

This approach is incorrect. Gwaltney's benefit from delaying expenditures is the benefit from delaying those expenditures that are necessary to achieve compliance. Gwaltney appears to have achieved compliance on the expenditures it has already incurred on its biological treatment system.

Although some of the testimony suggests that the modifications Gwaltney made in its treatment may not result in compliance with its TKN limitations, the Court believes it would be too speculative to reach that conclusion on the present record.

until the date of compliance, or the date on which compliance may reasonably be expected, as discussed above. The compliance problems arising out of the plant's biological treatment system commenced, for Gwaltney, in January 1982. They were not rectified until May 15, 1984.[26] This is a period of two years and over four months, or 2.37 years.

The rate at which Gwaltney benefited from the delay, as discussed *supra*, is 13%. Given such a rate, as well as the amount of expenditures involved and the period of benefit, Gwaltney's benefit from delaying expenditure is $54,022.[27]

b. *Gravity component.* As mentioned *supra*, in connection with the chlorination problems, Gwaltney argues that the gravity component of its penalty for all its violations, including those caused by its biological treatment system, should not exceed $4,900, when adjusted. With respect to the numerous TKN violations resulting from the problems with its biological treatment system, Gwaltney argues that the great majority were utterly innocuous from an environmental standpoint because TKN is not toxic, be-

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[26] The Court is aware that the evidence raises some question whether Gwaltney had permanently corrected its TKN problems by May 15, 1984, even though it experienced no further violations after that date; or whether instead Gwaltney would again experience TKN violations during the coldest winter months. As indicated *supra* note 21, the Court believes that such a conclusion would be too speculative, given the present record.

[27] This amount is based on yearly compounding, computed as follows:

1982: $159,745 x .13/yr x 1 yr =	$20,767
1983: ($159,745+$20,767) x .13/yr x 1 yr =	23,467
1984: ($159,745+$20,767+$23,467) x .13/yr x .37 yr =	9,811
TOTAL:	$54,045

cause the Pagan River is improving, and because most of the discharges occurred in the wintertime.

Some of its points are relevant to penalty considerations, although Gwaltney overstates its case. Gwaltney correctly points out that the presence of TKN in a river does not affect human health, according to the evidence. But it does have undeniable implications for the river's dissolved oxygen content, which is related to the environmental quality of the river. While none of the evidence reflects specific environmental damage resulting from Gwaltney's TKN violations, the Court does not believe that it should blind itself to those violations as a result.

Nor does the Court believe that Gwaltney's penalty should be mitigated because the Pagan River's condition is generally improving. Gwaltney's violations may have contributed to delaying that improvement. Compliance incentives would be undermined if polluters believed that their violations would not be treated seriously where environmental regulations have generated some improvement in the environment.

The Court does recognize, however, that Gwaltney's TKN violations during the winter months posed less environmental risk than summer violations. The process by which TKN depletes the river's oxygen slows down substantially with the colder winter temperatures. Plaintiffs point out that the Pagan River's tidal nature may inhibit the flushing of TKN from the river—raising the possibility that even winter TKN discharges may lead to oxygen depletion during warmer months. Nevertheless, the risk is certainly diminished. In the Court's view, fairness dictates that Gwaltney's winter TKN violations should be treated less harshly than its summer TKN violations. An appropriate penalty is $250 per day of violation for TKN violations during the months of November through April. For violations during the remaining

months of the year, a penalty of $1,000 per day of TKN violation is appropriate.

c. *Adjustments.* An important factor is the willfulness involved in a compliance problem. Gwaltney concedes that it could have begun addressing the problems in its biological treatment system substantially earlier. One major delay was that Gwaltney did not contact a consultant immediately upon experiencing unexpected TKN compliance problems in the winter of 1981-82; rather, it waited until late May, 1982, to do so. Gwaltney has submitted evidence that this—and other unnecessary delays it could have prevented—totaled 283 days. The Court concludes that this number is a reasonable approximation.

Gwaltney's penalties should be adjusted upward for each day of these controllable delays, just as its penalties were adjusted upward for the controllable delays in implementing a properly functioning chlorination system. The adjustment should not be as substantial, however, because the violations resulting from the problems in the biological treatment system appear to be less serious than those resulting from the chlorination problems. Further, there do not apear to be any human health implications from the poorly functioning biological treatment system, unlike the situation with the malfunctioning chlorination system. In the Court's view, this makes the controllable delays in implementing a properly functioning biological treatment system less culpable. The Court concludes that an amount of $250 per day of delay in addressing the problems with the biological treatment system is an appropriate adjustment to the penalty.

The Court believes that Gwaltney's penalty should be adjusted downward as well as upward due to the amount of willfulness involved in the violations arising out of its biological treatment system. According to the evidence, Gwaltney's violations after starting up its new system were largely uncontrollable; there is no way to start up

a biological treatment system without violations. A biological treatment system is apparently the best sort of system, overall, for a plant such as Gwaltney's. There is no evidence that Gwaltney's start-up period was greater than one would expect. The Court shall therefore account for the violations of Gwaltney's various permit limitations during its start-up period by assessing $50 per day per violation of the limitations on any substance, instead of the higher amounts discussed *supra*.

As indicated in the Court's discussion of Gwaltney's chlorination problem, Gwaltney also seeks to have its penalty adjusted downward to account for its cooperation in resolving its problems prior to litigation, and for its purported inability to pay. The Court has already rejected those arguments *supra*, and it need not address them again here.

In light of the foregoing discussion, Gwaltney's penalty for the compliance problems stemming from its biological treatment system is $289,822. Appendix B elaborates the computation of this amount.

CONCLUSION

Having determined that Gwaltney shall be assessed a civil penalty of $289,822 for violations arising out of the problems with its biological treatment system, as well as $995,500 for violations arising out of its chlorination

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[28] Gwaltney also suggests that its TKN discharges have little effect on the environment because of the point on the Pagan River at which they occur. Testimony did indicate that the discharges are slightly down-river from a "critical point" for dissolved oxygen in a SWCB pollution model. But testimony also indicated that tidal action could nevertheless result in Gwaltney's TKN discharges affecting that critical point upriver. Further, even if Gwaltney's TKN discharges do not affect the critical point, there is no evidence that they have no potentially adverse environmental impacts on other points in the river.

system, the Court shall impose upon Gwaltney a total civil penalty of $1,285,322.

An appropriate order will issue.

/s/ [Illegible]
United States District Judge

Date June 26, 1985

APPENDIX A

Gwaltney's Violations of NPDES Permit No. VA0002844 (based on DMRs and stipulation of parties), from November 1, 1981 to August 31, 1984.

Month	Substance Involved and Limitation Violated								
	Total Suspended Solids (TSS)		Total Kjeldahl Nitrogen (TKN)		Fecal Coliform (FC)		Oil and Grease (O/G)	Chlorine (Cl_2)	
	(mo. avg.)	(day max.)	(mo. avg.)	(day max.)	(mo. avg.)	(day max.)	(day max.)	(day min.)	(day max.)
11/81	—	—	—	—	1	1	—	1	1
12/81	—	—	—	—	1	1	—	1	1
1/82	—	—	1	5	—	1	—	1[b]	6[a]
2/82	—	—	1	10	1	3	—	—	3
3/82	—	—	1	4	1	3	—	1	1
4/82	—	—	—	—	1	3	—	6	—
5/82	—	—	—	—	1	3	—	1[b]	2[a]
[late May/82: Gwaltney contacts consulting firm about its TKN problems.]									
6/82	—	—	1	—	1	3	—	1	1
7/82	—	—	—	—	—	1	—	1	—
8/82	—	—	—	—	—	—	—	1	1
9/82	—	—	—	—	—	—	—	1	1
10/82	—	—	—	—	—	—	—	1	1
11/82	—	—	—	—	—	—	—	—	—
12/82	—	—	1	—	—	—	—	—	—

[1/5/83: Gwaltney submits plan for improving its biological treatment system to the State Water Control Board (SWCB).]

1/83	—	—	1	—	—	—	—	—	—
2/83	—	—	1	4	—	—	—	—	—
3/83	—	—	1	—	—	—	—	—	—
4/83	—	—	1	—	—	—	—	—	—
5/83	—	—	1	1	—	—	—	—	—

[5/31/83: SWCB approves Gwaltney's plan.]

6/83	—	—	—	—	—	—	—	—	—
7/83	—	—	—	—	—	—	—	—	—
8/83	—	—	—	—	—	—	—	—	—
9/83	1	—	1	—	—	—	—	—	—
10/83	—	—	1	8	—	1	—	—	—

[10/18/83: Gwaltney's new biological treatment system is completed.]

11/83	1	1	1	10	—	—	—	—	—
12/83	1	1	1	13	1	1	—	—	—
1/84	—	—	1	9	—	—	—	—	—
2/84	—	—	—	1	—	2	3	—	—
2/84	—	—	1	—	—	—	—	—	—
4/84	—	—	1	3	—	—	—	—	—
5/84	—	—	1	1	—	—	—	—	—
7/84	—	—	—	—	—	—	—	—	—
8/84	—	—	—	—	—	—	—	—	—
TOTAL	3	2	18	69	8	23	3	16[b]	18[a]

[a] at most this number of violations of the maximum chlorine standard.

[b] at least this number of violations of the minimum chlorine standard.

APPENDIX B

Penalties for Gwaltney's violations arising from its inadequate biological treatment system.

—*economic benefit*:	$ 54,022
—*gravity component*:	
—pre-start-up TKN violations	
• winter '81-'82: 90 days x $250/day =	22,500
• summer '82: 30 days x $1,000/day =	30,000
• winter '82-'83: 151 days x $250/day =	37,750
• summer '83: 61 days x $1,000/day =	61,000
—start-up violations: (including downward adjustment because start-up is involved)	
296 days (199 days TKN, + 61 days TSS, + 33 days fecal coliform, + 3 days oil & grease) x $50/day =	14,800
	166,050
• *further adjustments*:	
• delay: 283 days x $250/day =	70,750
TOTAL:	$289,822

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-1873

CHESAPEAKE BAY FOUNDATION, INC.; NATURAL RESOURCES DEFENSE,
Appellees,

vs.

GWALTNEY OF SMITHFIELD, LTD.,
Appellant,

UNITED STATES OF AMERICA,
Amicus Curiae,

ATLANTIC STATES LEGAL FOUNDATION, CONNECTICUT FUND FOR THE ENVIRONMENT, FRIENDS OF THE EARTH, SIERRA CLUB, and STUDENT PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY,
Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia

[Filed May 22, 1986]

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ John M. Greacen
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1873

CHESAPEAKE BAY FOUNDATION, INC., *et al.*,
Appellees,

versus

GWALTNEY OF SMITHFIELD, LTD.,
Appellant,

UNITED STATES OF AMERICA,
Amicus Curiae,

ATLANTIC STATES LEGAL FOUNDATION, *et al.*,
Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert A. Merhige, Jr., District Judge

[Filed June 26, 1986]

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Winter, with the concurrence of Judge Russell and Judge Sprouse.

For the Court,

/s/ JOHN M. GREACEN
Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, INC.
11 South 12th Street
Richmond, Virginia 23219

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.
122 East 42nd Street
New York, New York 10168
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.
Post Office Box 489
Smithfield, Virginia 23430
Defendant.

[Filed June 15, 1984]

COMPLAINT

Statement of the Case

1. This is a citizens' suit, brought under Section 505 of the Clean Water Act ("the Act"), 33 U.S.C. Sec. 1365, for the defendant's violations of the terms and provisions of its National Pollutant Discharge Elimination System ("NPDES") permit number VA0002844.

Jurisdiction and Venue

2. This Court has subject matter jurisdiction over the claims set forth in this complaint, by virtue of Sec. 505 (a) (1) of the Act, 33 U.S.C. Sec. 1365(a) (1).

3. On February 29, 1984, plaintiffs gave notice of the violations and their intent to file suit to the Administrator of the United States Environmental Protection Agency ("EPA"), to the Virginia State Water Control Board (the "Board"), and to the defendant, as required by Section 505(b) (1) (A) of the Act, 33 U.S.C. Sec. 1365(b) (1) (A).

4. More than sixty days have passed since notice was served and the violations complained of therein have not ceased and neither EPA nor the Virginia State Water Control Board has commenced and diligently prosecuted a court action to redress the violations.

5. Venue is appropriate in the Eastern District of Virginia pursuant to Section 505(c) (1) of the Act, 33 U.S.C. Sec. 1365(c) (1), because the source of the violations complained of is located within this District.

Parties

6. Plaintiff Chesapeake Bay Foundation, Inc. ("CBF") is a non-profit corporation organized in 1966 under the laws of the State of Maryland, with its principal place of business in Annapolis, Maryland, and another office in Richmond, Virginia. CBF is a regional conservation organization with over 19,000 members in the Chesapeake Bay area, dedicated to protecting natural resources, including water.

7. Members of CBF reside in Virginia, in the vicinity of the Pagan River, and recreate in, on or near, and otherwise use and enjoy, the Pagan River and the water system of which it is a part. The quality of the nation's waters and the waters of the Commonwealth of Virginia

directly affects the health, recreational, aesthetic, and environmental interests of CBF's members. The interests of CBF's members have been, are being and will be adversely affected by the defendant Gwaltney of Smithfield, Ltd.'s failure to comply with its NPDES permit requirements.

8. Plaintiff Natural Resources Defense Council, Inc. ("NRDC") is a not-for-profit membership corporation organized under the laws of the State of New York, with offices in New York, Washington, D.C. and San Francisco, California. NRDC has over 828 individual members in the Commonwealth of Virginia. NRDC is dedicated to the preservation, protection and defense of the environment, its wildlife and natural resources, and actively supports effective enforcement of Federal and State implementation of the Clean Water Act on behalf of its members.

9. Members of NRDC reside in Virginia, in the vicinity of the Pagan River, and recreate in, on or near the Pagan River and the water system of which it is a part. The quality of the nation's waters and the waters of the Commonwealth of Virginia directly affects the health, recreational, aesthetic and environmental interests of NRDC's members. The interests of NRDC's members have been, are being and will be adversely affected by the defendant Gwaltney of Smithfield, Ltd.'s failure to comply with its NPDES permit requirements.

10. Defendant Gwaltney of Smithfield, Ltd. is a corporation organized under the laws of the State of Delaware, and licensed to do business in the Commonwealth of Virginia. Defendant operates a high-processing packing house in Smithfield, Virginia.

Background

11. Section 301(a) of the Act, 33 U.S.C. Sec. 1311(a), prohibits the discharge of pollutants from a point source

into navigable waters of the United States, unless in compliance with various enumerated sections of the Act. Among other things, Section 301(a) prohibits such discharges not authorized by or in violation of the terms of an NPDES permit pursuant to Section 402 of the Act, 33 U.S.C. Sec. 1342.

12. Under Section 402(a)-(b) of the Act, 33 U.S.C. Sec. 1342(a)-(b), the Administrator of EPA has authorized the Virginia State Water Control Board to issue NPDES permits. The applicable Virginia law is Va. Code Section 62.1-44.2, *et. seq.* (the "Statute").

13. The Board pursuant to Section 62.1-44.15(5) of the Statute, issued to defendant NPDES permit number VA0002844 on October 23, 1979, as amended, and modified, authorizing defendant to discharge limited quantities of pollutants into the Pagan River.

14. Section 308 of the Act, 33 U.S.C. Sec. 1318, requires NPDES permittees to establish and maintain records; install, use and maintain monitoring equipment; sample effluents; and report on a regular basis to the permit-issuing Agency regarding the facility's discharge of pollutants. The reports consist of Discharge Monitoring Reports (DMRs) and Non-Compliance Reports (NCRs).

General Allegations

15. Defendant operates a high-processing packing house in Smithfield, Virginia. It discharges the treated wastes from its operations through a point source into the Pagan River pursuant to NPDES permit number VA0002844. The Pagan River is a navigable water of the United States.

16. Defendant has violated the waste water discharge limits contained in its NPDES permit, as set forth in a letter to defendant dated February 29, 1984, attached hereto as Exhibit A and incorporated by reference herein.

17. Defendant has continued to violate its discharge permit since plaintiffs' letter dated February 29, 1984.

Such violations, reported by defendant in its DMRs, are set forth at Exhibit B, attached hereto and incorporated by reference herein.

18. Plaintiffs believe and allege that, without the imposition of appropriate fines and issuance of an injunction, defendant Gwaltney of Smithfield, Ltd. will continue to violate its NPDES permit to the further injury of plaintiffs.

Claim for Relief

19. Plaintiffs reallege and incorporate by reference herein the allegations of paragraphs 2 through 18 of this Complaint.

20. Defendant's waste water discharges identified in paragraphs 16 and 17 are discharges from a point source into navigable waters of the United States within the meaning of 33 U.S.C. Sec. 1311.

21. Each of defendant's waste water discharges identified in paragraphs 16 and 17 is a separate violation of Section 301(a) of the Act, 33 U.S.C. Sec. 1311(a), for each day on which it occurred.

Relief Requested

22. Wherefore, plaintiffs Chesapeake Bay Foundation and Natural Resources Defense Council, Inc. respectfully request this Court to grant the following relief:

A. Declare defendant Gwaltney of Smithfield, Ltd. to have violated and to be in violation of the Clean Water Act, 33 U.S.C. Sections 1311 and 1342;

B. Enjoin defendant from operating its high processing packing house in Smithfield, Virginia in such a manner as will result in the further violation of defendant's NPDES permit number VA0002844;

C. Provide plaintiffs with a copy of all reports which defendant submits to the State or Federal government

related to defendant's NPDES permit at the time it is submitted to these authorities;

D. Order defendant to pay civil penalties of $10,000 per day of violation for each violation pursuant to Sections 309(d) and 505(a) of the Act, 33 U.S.C., Sections 1319(d) and 1365(a).

E. Award plaintiffs costs (including reasonable attorney, witness and consultant fees) as authorized by the Act, 33 U.S.C. Sec. 1365(d); and

F. Award such other relief as this Court deems appropriate.

June 15, 1984

Respectfully submitted,

/s/ Jeter M. Watson
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Chesapeake Bay Foundation
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Richmond, Virginia 23219
(804) 780-1392

/s/ James Thornton
JAMES THORNTON
Natural Resources Defense
Council, Inc.
122 East 42nd Street
New York, New York 10168

Counsel for Chesapeake Bay Foundation and
Natural Resources Defense Council, Inc.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, INC.

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Plaintiffs

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[Filed December 17, 1984]

STIPULATION

The parties would stipulate to the truth of the facts herein and the authenticity of the documents listed as exhibits.

1. Defendant Gwaltney of Smithfield, Ltd., a newly created subsidiary of Smithfield Foods, Inc., acquired the assets of ITT-Gwaltney, Inc. ("ITT-Gwaltney") and became responsible for effluent discharges under NPDES Permit No. VA 0002844 on October 27, 1981. [Exhibits 1,2.]

2. Defendant had knowledge of ITT-Gwaltney's Discharge Monitoring Reports for calendar year 1980 and

through August 1, 1981, prior to acquisition. [Exhibit 3.]

3. Prior to the acquisition, Sharon City and Henry Morris, representatives of defendant, met with Robert L. Dearth, Vice President/Engineering for ITT-Gwaltney, to determine the compliance status of the Gwaltney wastewater system. The letter from Mr. Dearth to Joseph W. Luter, III, dated September 21, 1981, is attached. In September 1981 a representative of Wells Engineers, Inc., consultant engineers, told Sharon City that the ITT-Gwaltney waste treatment system could not meet TKN limitations during the coldest months.

4. Defects in the design of the ITT-Gwaltney system were disclosed in the Concept Engineering Report prepared for defendant by Wells Engineers, Inc., the aforementioned consulting engineers, and submitted to defendant in July 1982.

5. The chlorination system was another problem. A new automatic chlorinator was ordered to replace the existing manual chlorinator. It was installed on March 25, 1982.

6. Employees of defendant toured the Gwaltney system prior to acquisition and met with employees of ITT-Gwaltney to discuss the system and its discharge violations during 1980-81. [Exhibits 7,8.]

7. Defendant has violated the effluent limitations in NPDES Permit No. VA 0002844 on those occasions indicated by its Discharge Monitoring Reports ("DMR"s) filed with the Virginia State Water Control Board. [Exhibit 10.]

8. Defendant's DMR s [Exhibit 10] do not reflect any permit violations on any occasion subsequent to May 15, 1984.

9. A summary of reported permit violations committed by ITT-Gwaltney from February 1980 through

October 1981 and by defendant from November 1981 is contained in Exhibit 10A.

10. Defendant has not reported any violations of its permit limitations for BOD (biochemical oxygen demand).

11. Defendant violated its TSS (total suspended solids) permit limitations during September 1983 and during the months of November and December 1983. Startup of its upgraded treatment system commenced on October 18, 1983. It has reported no other such violations.

12. Defendant has reported 87 violations of its permit limitations for TKN (total Kjeldahl nitrogen). Of those 87 reported violations, 72 occurred during the months of November to April. Lower temperatures during those months slow the microbiological activity necessary to nitrification in both the treatment system and the receiving stream. Defendant has not reported any violations of its TKN limitation since May 15, 1984.

13. Defendant has reported violations of its permit limitations for fecal coliform on 31 occasions, but only on 5 occasions since July 1982.

14. Defendant has reported violating its permit limitation for oil and grease on 3 occasions, all in February 1984.

15. Defendant has reported violating its permit limitations for chlorine (Cl2) on 34 occasions, but not on any occasion subsequent to October 1982. Defendant completed the physical improvements to the chlorination system in July 1982. Chlorine is the agent the State permit required ITT-Gwaltney and defendant to employ to destroy fecal coliform bacteria in the effluent prior to discharge to the Pagan River. Defendant is required to maintain at least 1.5, and not more than 2.5, parts per million of chlorine residual in its effluent, and is re-

quired to sample its effluent each hour to determine compliance with this requirement. At least 17 of defendant's 34 chlorine violations concern maintenance of an insufficient amount of chlorine, and not excessive chlorine. In its application for reissuance of NPDES Permit No. VA 0002844, defendant asked for and has tentatively received an exemption from the requirement that it maintain a minimum residual of chlorine in its effluent. [Exhibits 10P-Q.]

16. Defendant's production rates (in average number of hogs killed per day) for the period of November 1981-May 1984 are set out in Exhibit 50A.

17. At defendant's request, Wells Engineers, Inc., prepared and on or about July 22, 1982, submitted a Concept Engineering Report describing modifications to the existing waste treatment system that Wells believed were needed to meet the requirements of the permit. [Exhibit 55.] This Report was based in part on the results of defendant's June 1982 sampling program.

18. The Concept Engineering Report discussed both an "interim solution" and a "permanent solution". The "interim solution" involved construction of a new anaerobic effluent control structure, a new aeration basin utilizing half of the existing final lagoon and segregated from the remainder of the lagoon by a floating baffle wall, and relocation of nine existing 25-horsepower floating surface aerators to the new aeration basin. The total estimated construction cost of the interim solution was $53,000 (without electrical work) and additional annual operation and maintenance costs were estimated to be $17,500. [Exhibit 55 at 10,15.]

19. The "permanent solution" included all of the "interim solution" except the floating baffle wall and small amounts of piping and electrical work, plus an aeration basin splitter structure, two new aeration basins, and a new clarifier splitter structure. The total estimate for

construction, engineering and related costs for the "permanent solution" was $506,000 (including electrical work). The cost of the two new aeration basins with appurtenances constituted the bulk of the difference in costs between the two proposals.

The report estimated that the "permanent solution" would result in a net reduction of $8,800 in existing annual operation and maintenance costs, and a net annual reduction of $26,300 below the annual operation and maintenance costs of the "interim solution". [Exhibit 55 at 13, 12, 16.]

20. On August 12, 1982, Henry Morris recommended to Kenneth W. Brown, President of Gwaltney of Smithfield, Ltd., that the Wells Engineers "interim solution" be put into action. [Exhibit 56.]

21. On September 29, 1982, Gwaltney notified the State Water Control Board that it wished to make modifications to the Wells Engineers interim solution to accomplish the same goals as outlined by Wells with much less expenditure in time and money. [Exhibit 57.]

22. On October 26, 1982, Henry Morris was given responsibility for defendant's engineering operations, including the wastewater treatment system.

23. Mr. Morris wrote Mr. Terrence Switzer of the State Water Control Board on October 28, 1982. [Exhibit 62.]

24. Mr. R. V. Davis, Executive Director of the State Water Control Board, responded on November 12, 1982, to Mr. Morris' letter of October 28, 1982. Mr. Davis, like Mr. Morris, expressed reservations concerning the plan submitted by defendant on September 29, 1982, modifying the Wells plan. Mr. Davis stated that in response to Mr. Morris' letter, the Board was holding consideration of formal enforcement action in abeyance; and he

asked Mr. Morris to submit plans and schedules for permit compliance by November 30, 1982. [Exhibit 22.]

25. Mr. Morris responded to Mr. Davis on November 30, 1982, enclosing a proposed schedule of compliance. [Exhibit 22A.] The proposed schedule provided for (1) detailed plans and specifications to be prepared by Wells Engineers in accordance with the Concept Engineering Report and submitted to the Board by December 30, 1982; (2) for State Water Control Board approval of the plans and specifications by January 31, 1983; (3) for construction to begin by March 1, 1983, and to be completed by April 15, 1983; and (4) for compliance with effluent limitations to be achieved by May 27, 1983.

26. The actual improvements made in the defendant's wastewater treatment system are outlined in paragraphs 27-29.

27. *Chlorination and fecal coliform.* Chlorination of effluent is employed to kill fecal coliform bacteria before discharge of effluent to surface waters. Chlorination is the last step in defendant's treatment system.

The first reported violations of chlorine and fecal coliform limitations occurred in August 1981, approximately 2½ months prior to the acquisition, and continued subsequent to the acquisition. A new chlorinator was ordered in September 1981 to solve these problems. The first shipment of parts was received in December, but the automatic valve was backordered and not received until March 16, 1982. This equipment was installed on March 25, 1982. Without this automatic valve, the chlorine feed rate had to be set manually.

Defendant also ordered special dyes to be use in testing the effluent retention time in the chlorine contact tank. Effective disinfection requires a minimum retention time, and the existing tank was suspected not to meet this minimum requirement. The supplier initially sent the wrong dyes, which were received on March 17, 1982, and

returned on March 26, 1982. The correct dyes were subsequently received, and defendant dye-tested the chlorine contact tank on May 4, 1982. The tests confirmed suspicions that retention time was inadequate. Defendant initiated plans and ordered materials to modify the contact tank to increase the retention time. On June 1, 1982, defendant drained the tank, installed baffles to retard effluent flow through the tank, and sealed off the multiple discharge points.

Defendant experienced further problems with the chlorination system in July-August 1982, including plugging of the chlorine feed equipment due to rusted iron chlorination piping. Defendant replaced the main pump for the chlorine injector, the main controller, the chlorine control analyzer, all of the electrical wiring to the main effluent pumps, and much of the piping in the system to correct those problems. It also had much of the system repaired and cleaned. Defendant's last reported chlorine violation occurred in October 1982. Defendant did not seek outside engineering advice regarding design of the automatic chlorinator. The automatic chlorine sampler was serviced by the manufacturer's representative when problems were discovered in August 1982. [Exhibits 11A, 11B, 11C, 11D, 11E, 11F, 11G, 11H, 34, 11-I, 11J, 24, 13A, 13B, 35, 13C, 13D, 16A, 17A, 17B, 37, 38, 39, 18A, 19A, 19B, 40, 19C, 41, 19D, 42, 19E, 19F, 43, 19G, 19H, 19-I, and 20A.]

28. *TKN.* Detailed plans and specifications were prepared and submitted by Wells Engineers to the Board on January 5, 1983, to which the State Water Control Board responded on February 18, 1983, asking four questions which defendant answered on March 2, 1983. [Exhibit 66, 66.]. The submission was delayed by an ice storm and blizzard in Nebraska, where Wells' offices are located, which prevented any work in the last week of December 1982. [Exhibit 57A.]

Defendant began soliciting bids from contractors in early March 1983.

The State Water Control Board sent defendant a second letter, dated March 10, 1983, [Exhibit 66A], concerning the nitrification efficiency predictions. Defendant answered these questions by letter dated March 31, 1983. [Exhibit 66B.] On April 27, 1983, the Board requested nitrification information on other systems already in operation. [Exhibit 67.] This letter further advised defendant that a formal but conditional approval would be forthcoming in a couple of weeks, and asked that the additional information be submitted by May 31, 1983. By letter of May 13, 1983, defendant provided the requested information, including that on the design and performance of the wastewater treatment system at Smithfield Packing Company. [Exhibit 69.] Defendant also objected to conditional approval, and stated that it would not award a construction contract on conditional approval. [Exhibit 69.]

The State Water Control Board issued its final approval of the plans on May 31, 1983. [Exhibit 71.] Defendant received the notice of approval on June 2, 1983, but Henry Morris, who was in charge of defendant's engineering, was out of the country, and did not receive the notice until his return on June 10, 1983. Defendant wrote the Board on June 3, 1983, advising of Mr. Morris' unavailability and asking for an extension of its schedule of compliance. [Exhibit 72.]

Defendant awarded a construction contract on June 17, 1983, but was unable to begin work until July 6, 1983, because of the need to firm up some prices obtained in March 1983.

Construction was completed and the upgraded system became operational on October 18, 1983. Defendant lost several weeks during construction due to equipment breakdowns and underground obstructions. [Exhibit 75.]

Starting the upgraded system involved starting a new anaerobic lagoon and a new aerobic lagoon, and the former had to perform well before the latter could begin to perform well. The startup of a new anaerobic lagoon involves a complex interplay between different types of microorganisms. Some period of time is required before that system will stabilize and function properly. Defendant started the anaerobic process in the fall, when there was insufficient time for the lagoon to develop the grease cover which acts as an insulating blanket. Without this cover in the winter, wastewater temperatures, and consequently biological activity, drop until essentially all biological nitrification stops at 60 degrees Fahrenheit. Defendant's last TKN violation occurred on May 15, 1984.

29. Defendant spent a total of $214,131 on improvements to its wastewater treatment system during the period from October 27, 1981, to October 18, 1983, when the major system modifications were completed. Defendant has spent another $51,345 to date on further improvements. These total expenditures are in addition to operation and maintenance expenses.

30. Fecal coliforms are microbes found in the gut of all warm blooded animals, and are thus microbiological indicators used to determine the presence of body wastes from such animals, and in turn, the safety of water for drinking, swimming, and shellfish harvesting. The potential for disease transmission attributable to the presence of fecal coliform bacteria is more fully discussed in *Quality Criteria for Water*, EPA (1976). [Relevant sections are attached hereto as Exhibit 89.] Certain fecal coliforms are a potential medium of disease transmission.

31. Virginia has adopted standards establishing maximum fecal coliform levels for state waters. According to a Water Quality Inventory prepared three years ago from data then available, high fecal coliform levels in the Pagan River resulting from both point and nonpoint

sources prevented that River from meeting water quality standards. The major point sources listed included defendant's effluent; Smithfield Packing Company; the Town of Smithfield, which was reportedly beginning an upgrade and expansion of its sewage treatment plant; and the sewage treatment plant for the Pinewood Heights Subdivision. [Exhibit 90.] In addition, the State Health Department has identified a number of other sources of wastes that are present on the Pagan River. In all there are 38 sources of pollution along the Pagan River including sources of animal pollution, boat pollution, and industrial wastes. Fecal coliform levels in the Pagan River are attributable in part to effluent from defendant's system. Because of the presence of treated human sewage effluent and fecal coliform levels in excess of the standards for shellfish harvesting waters, the Pagan River has in part been condemned by the state for the harvesting of shellfish, [Exhibits 91, 91A]; but the area of the Pagan previously condemned has been decreased due to improvements obtained in water quality during the past twelve years. [Exhibit 90A.] Shellfish obtain food by pumping water through their filters and thus have a very large effective exposure to their environment, despite their being fixed in place. Shellfish, including oysters and clams, are eaten raw by humans, and if contaminated by fecal material, can be a medium of disease transmission.

32. Chlorine residuals in treated effluents are toxic when present in sufficient concentration. The State Water Control Board imposed minimum and maximum chlorine concentrations to be contained in defendant's treated effluent. Those maximum concentrations approximate the acutely toxic concentration for certain estuarine organisms, especially during their early life stages. [Exhibit 92.]

33. In recognition of this problem, the State Water Control Board adopted a Proposed Water Quality Stand-

ard for chlorine on September 25, 1984. The Proposed Standard states that the total residual chlorine concentration in freshwater shall not exceed a maximum concentration of 14 parts per billion, and that the chlorine produced oxidant concentration in saline water shall not exceed 13 parts per billion. Exceptions to these proposed standards would be made only for a limited mixing zone where chlorinated effluent mixes with the receiving stream. [Exhibit 93.]

34. BOD (biochemical oxygen demand) is a conventional measurement of the extent to which treated wastewater effluents would be expected to deplete dissolved oxygen levels in receiving waters. Defendant has reported no BOD violations.

35. Total Kjeldahl nitrogen, or TKN, is a measurement of ammonia and organic nitrogen. TKN is converted by microorganisms to nitrate in a process known as nitrification. During this process oxygen is consumed.

36. Defendant's NPDES Permit No. VA 0002844 has an expiration date of October 23, 1984. [Exhibit 98.]

37. On May 30, 1984, T. L. Switzer of the State Water Control Board wrote a memorandum to file concerning a phone conversation with Terry Rettig of Smithfield Foods, Inc., about, among other things, both subsidiary companies' NPDES permits, which were due for reissuance. The memorandum states in paragraph 3:

> It was pointed out to Mr. Rettig that the reissuance applications for the Smithfield and Gwaltney plants, due on May 23, 1984, have not yet been received. Mr. Rettig stated that he is awaiting lab analysis for the applications, which he is currently working on.

[Exhibit 99.]

38. Mr. Rettig met with Mr. Switzer on March 23, 1984, and discussed the requirements for reissuance ap-

plications. Mr. Switzer and Mr. Rettig discussed the draft applications that Mr. Rettig had prepared, and Mr. Switzer asked that certain additional data be gathered before the applications were formally submitted. Mr. Rettig undertook the required sampling and analysis to generate the requested data, and he incorporated that data into applications which he filed with Mr. Switzer on June 11, 1984.

39. The parties stipulate to the authenticity of the following exhibits: 1 to 10, inclusive, 10A to 10S inclusive, 11A to 11J inclusive, 13, 13A to 13D inclusive, 14 to 16 inclusive, 16A, 17, 17A, 18, 18A, 19, 19A to 19-I, inclusive, 20, 21, 22, 22A, 23 to 50 inclusive, 50A, 51 to 57 inclusive, 57A, 58 to 66 inclusive, 66A to 66D inclusive, 67 to 78 inclusive, 78A, 79 to 90 inclusive, 90A, 91, 91A, 92 to 94, inclusive, 98 to 103 inclusive.

Respectfully submitted,

CHESAPEAKE BAY FOUNDATION

By: /s/ Jeter M. Watson
JETER M. WATSON

NATURAL RESOURCES DEFENSE COUNCIL, INC.

By: /s/ James Thornton
JAMES THORNTON

GWALTNEY OF SMITHFIELD, LTD.

By: /s/ Anthony F. Troy
ANTHONY F. TROY

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Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,
and
NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Attorneys for Respondent
Natural Resources Defense Council, Inc.

QUESTION PRESENTED

Whether the federal district courts have jurisdiction under Section 505 of the Clean Water Act, 33 U.S.C. 1365(a), to entertain "citizen suits" seeking civil penalties for chronic episodic violations of the Act that occurred prior to the filing of the suit.

PARTIES TO THE PROCEEDINGS

Respondents and plaintiffs-appellees below are Chesapeake Bay Foundation, Inc., and Natural Resources Defense Council, Inc. Chesapeake Bay Foundation, Inc., a tax-exempt corporation organized under the laws of the State of Maryland, operates state offices in Maryland, Pennsylvania, and Virginia, and has members in all 50 states and the District of Columbia. In Virginia, Chesapeake Bay Foundation has two subsidiary chapters, the Hampton Roads Chapter, comprised of members residing in the Hampton Roads area, and the York Chapter, comprised of members residing in the vicinity of the York River. Natural Resources Defense Council, Inc., is a not-for-profit membership corporation organized under the laws of the State of New York, with

offices in New York, Washington, D.C., and San Francisco, California. Petitioner and defendant-appellant below Gwaltney of Smithfield, Ltd. is a wholly-owned subsidiary of Smithfield Foods, Inc.

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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

No. 86-473

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,
and
NATURAL RESOURCES DEFENSE COUNCIL,
INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 791

F.2d 304. The opinion of the district court (Pet. App. 26a-74a) is reported at 611 F. Supp. 1542.

JURISDICTION

The judgment of the court of appeals (Pet. App. 75a-76a) was entered on May 22, 1986. A petition for rehearing was denied on June 26, 1986 (Pet. App. 77a-78a). The petition for a writ of certiorari was filed on September 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 505(a) of the Clean Water Act, 33 U.S.C. 1365(a), provides as follows (emphasis added):

> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own be-

half--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such an act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

STATEMENT

1. Pursuant to Section 402 of the Clean Water Act, 33 U.S.C. 1342, petitioner possesses a permit to discharge specified amounts of pollutants from its meat packing plant into the Pagan River, a tributary of the Chesapeake Bay (Pet. App. 2a, 3a, 27a-28a; App., infra 4a).[1] Petitioner exceeded the discharge limitations in its permit on numerous occasions between October 27, 1981--the date on which petitioner acquired the meat packing plant and thereby assumed responsibility for the plant's discharges--and June 15, 1984--the date on which respondents commenced this action for declaratory and injunctive

[1] The pollutants are fecal coliform, chlorine, total suspended solids, total Kjeldahl nitrogen, and oil and grease (Pet. App. 5a n. 5).

relief and the imposition of civil penalties payable to the United States Treasury.[2] Petitioner's own Discharge Monitoring Reports ("DMRs")[3] constituted the proof of its permit violations (Id. at 5a).

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[2] In its Findings of Fact and Conclusions of Law as Stated from the Bench (App., infra 1a-7a), the district court found that petitioner had exceeded the discharge limitations contained in its permit on at least 237 occasions between January 1979 and June 15, 1984 (Id. at 5a). The court subsequently agreed with petitioner's contention that it should be relieved of liability for violations that had occurred prior to petitioner's acquisition of the plant. Thereafter, the parties stipulated that 160 post-acquisition reported violations had occurred (Pet. App. 45a n. 12). The stipulation did not relate to the number of "days of violation" involved.

[3] DMRs are required by the Clean Water Act and regulations promulgated thereunder. See 33 U.S.C. 1318(a), 1342(a)(1) and (2); 40 C.F.R. 122.41(l)(4) and 123.25(a)(12).

Respondents invoked the jurisdiction of the district court pursuant to Section 505(a) of the Clean Water Act, 33 U.S.C. 1365(a), which authorizes "citizen suits" to be brought against any person "who is alleged to be in violation of (A) an effluent standard or limitation under this chapter* * *." Respondents complied with the statutory prerequisites for an action under Section 505(a) by providing petitioner, the Administrator of the United States Environmental Protection Agency ("EPA"), and the Virginia State Water Control Board with more than 60 days' notice of their intent to bring suit. See Section 505 (b)(1)(A) of the Act, 33 U.S.C. 1365(b) (1)(A). Specifically, respondents gave notice of their intent to sue on February 29, 1984 (See Pet. App. 80a). Petitioner's permit violations, as reflected

by its subsequent DMRs, continued until May 15, 1984, or some two-and-one-half months after respondents gave notice of their intent to sue (Id. at 4a-5a, 80a). Respondents accordingly filed suit on June 15, 1984, based on continuing permit violations as shown on the DMRs available at the time the complaint was filed (Id. at 82a-83a). Not until after the filing of the complaint were any violation-free months reported by petitioner.[4]

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[4] Petitioner would have the Court believe that it was in general compliance with its permit in March 1984, when the Virginia State Water Control Board (to which the authority to issue permits under the Act has been delegated by EPA) decided not to initiate an enforcement action against petitioner in state court (See Pet. 4-5 & n. 3). In actuality, the Board declined to initiate such an action in March because a Gwaltney official testified under oath that petitioner was in compliance (Ct. App. Ex.

2. On August 28, 1984, the district court granted summary judgment for respondents on the issue of liability, there being no dispute that the permit violations had occurred (App., infra 6a). The question of remedy was set for trial in December, 1984.

On May 16, 1985, more than eight months after the district court's ruling

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(Footnote Continued)

Vol. 422-423). But petitioner continued to violate its permit in March, and the violations were not abated until May 15, 1984 (Id. at 314-323). A violation-free month was not reported until the June 1984 DMR, which was filed after respondents had initiated this action (Pet. App. 86a). Contrary to the impression it seeks to convey, therefore, petitioner appears very much to have been the type of chronic episodic violator who "intentionally 'turns off the spigot' just before a citizen brings a suit" (Pet. 7 n. 4 (quoting Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392, 399 (5th Cir. 1985) (Williams, J., concurring)).

on liability and more than four months after trial on the remedy, petitioner moved to dismiss the action for lack of jurisdiction. Petitioner relied on Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392 (5th Cir. 1985), in which the court held that Section 505 does not authorize citizen suits for civil penalties if the violations alleged in the complaint are not "ongoing" at the time of suit. Relying on the post-complaint DMRs that reported no violations subsequent to May 15, 1984, petitioner contended that it was not "in violation" of its permit at the time this suit was filed.

The district court rejected petitioner's argument on two alternative grounds (Pet. App. 33a-43a). First, the court concluded that the words "to be in violation," as used in Section 505(a)

of the Act, "may reasonably be read as comprehending unlawful conduct that occurred solely prior to the filing of the lawsuit as well as unlawful conduct that continues into the present" (Id. at 34a). Alternatively, the court held that respondents' allegations in the complaint of continuing violations were made in complete good faith. The court thus reasoned that, "even if [petitioner] were correct that a district court has no jurisdiction over citizen suits based entirely on unlawful conduct that occurred entirely in the past, the Court would still have jurisdiction here" (Id. at 38a n.8). The court analogized to the jurisdictional amount requirement in diversity cases, which is tested not by the amount the plaintiff actually recovers but by the amount stated in good faith in the original claim (Id. at

38a-39a n.8). The allegations in respondents' complaint satisfied the good faith test, the court concluded, because "there was no certainty here--legal, factual, or otherwise--that [petitioner's] system would correct one of the two major violation problems for which this suit was brought--until nearly one year after the suit was filed" (Id. at 39a n.8).

The district court then determined the maximum civil penalty for which petitioner could be held liable. The court ruled that the maximum number of days of liability for violations of monthly averages contained in petitioner's permit was the number of days in the month, but that the maximum daily penalty was limited by statute (33 U.S.C. 1319(d)) to $10,000 per day, regardless of the number of violations in a

given day (Pet. App. 43a-51a). Applying these principles, the court calculated petitioner's maximum potential civil penalty to be $6,660,000 (Id. at 51a-53a). Using EPA's Civil Penalty Policy, 41 Env't Rep. Cas. (BNA) (Fed. Laws) 2991 (1984), as a nonbinding guideline (Id. at 53a), the court then determined that the appropriate penalty to be assessed against petitioner was $1,285,322 (Id. at 71a). In setting the amount of the penalty, the district court noted that petitioner's response to specific discharge problems at the plant "trivialize[d] [their] seriousness," was "nothing less than offensive," "border[ed] on benign neglect," and contributed to hundreds of days of violations that, by petitioner's own admission, could have been prevented (Id. at 59a 60a, 62a, 69a). The court also found

that petitioner had derived significant economic benefit from its delays in bringing the plant's biological treatment system into compliance (Id. at 55a-58a, 66a-67a).

3. The court of appeals affirmed the district court's judgment in all respects (Pet. App. 1a-25a). Specifically, the court held: (1) that the absence of an ongoing violation at the time the complaint is filed does not defeat federal jurisdiction under Section 505(a) of the Clean Water Act in an action for civil penalties (Pet. App. 7a-18a, 25a); (2) that, in setting an "appropriate" civil penalty under 33 U.S.C. 1319(d), violations of "average" limitations encompassing periods greater than one day are to be treated as a violation for each day of the time period involved (Pet. App. 18a-22a, 25a); and

(3) that the district court did not abuse its discretion in calculating the penalty actually assessed against petitioner (Id. at 22a-25a).[5] With respect to the issue that petitioner asks this Court to review, the court of appeals ruled that petitioner's narrow reading of Section 505(a), "creating jurisdiction to impose [civil] penalties only in suits involving violations that continue up to the time suit is filed, places an untenable limitation on the use of citizen suits and civil penalties as a tool of enforcement and deterrence" (Pet. App. 18a).

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[5] Petitioner has not asked this Court to review the latter two issues.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court, and would not serve as an appropriate vehicle for resolution of the conflict that petitioner alleges between the decision below and Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392 (5th Cir. 1985). Accordingly, review by this Court is not warranted.

1. a. Section 505(a) of the Clean Water Act, 33 U.S.C. 1365(a), authorizes citizen suits to be maintained against any person "who is alleged to be in violation of" various requirements imposed under the Act. Petitioner contends (Pet. 7-10) that Congress's use of the present tense in the drafting of

this section so plainly forecloses citizen suits founded on pre-complaint violations that further analysis is unnecessary. However, as the courts below correctly have held, petitioner's reading of the statutory language is not the only possible interpretation of the words Congress chose. To the contrary, as the district court below noted, "the language is ambiguous" (Pet. App. 8a); and as the court of appeals below stated, "the words 'to be in violation' may reasonably be read as comprehending unlawful conduct that occurred solely prior to the filing of the lawsuit as well as unlawful conduct that continues into the present" (Id. at 34a). As another court has explained (Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. 1190, 1195 (D.N.J. 1985)):

> "A plausible construction of the language is that one is 'in violation,' and continues to be 'in violation' by having 'violated.' In other words, the taint of a past violation is continuing." Student Public Interest Research Group of New Jersey v. Monsanto Co., 600 F. Supp. 1474, 1476 (D.N.J. 1985)* * *. It would not be odd locution to say someone is "in violation" of the tax laws even though he or she filed the fraudulent return two or three years ago, or "in violation" of election laws for failing to report campaign contributions received for a past campaign. Similarly, a polluter might be "in violation" of the [Clean Water Act] for violations of two or three years ago.

This construction of Section 505(a) comports with the structure of the Act as a whole. Virtually all of the Act's enforcement provisions, including those authorizing enforcement actions by EPA, are written in the present tense. See, e.g., Section 309(a)(1), 33 U.S.C. 1319 (a)(1) (emphasis added) (the Administrator is authorized to take enforcement

actions whenever he "finds that any person is in violation of any condition or limitation * * *); Section 309(a)(3), 33 U.S.C. 1319(a)(3) (emphasis added) (the Administrator may issue a compliance order when he "finds that any person is in violation" of provisions of the statute); Section 309(c), 33 U.S.C. 1319(c) (emphasis added) (criminal penalties may be imposed against "any person who willfully or negligently violates" provisions of the statute or permit conditions or limitations); Section 309(d), 33 U.S.C. 1319(d) (emphasis added) (civil penalties may be imposed against "any person who violates" provisions of the statute or permit limitations or conditions).

Thus, if petitioner's reading of Section 505(a) were to be accepted, the conclusion would follow inescapably that

EPA is likewise prohibited from taking any enforcement action against polluters whose violations ceased prior to the filing of suit. But the courts have consistently rejected reading any such limitation into EPA's enforcement powers. See, e.g., United States v. Earth Sciences, Inc., 599 F.2d 368, 376 (10th Cir. 1979) ("It is plainly inconsistent with the strong enforcement policy of the Act to declare that EPA must choose between prevention of future pollution discharges and punishment of past violations through civil penalties."). Accord Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. at 1198; United States v. Detrex Chemical Industries, Inc., 393 F. Supp.

735, 737-738 (N.D. Ohio 1975).[6] Petitioner's reading of the statute also attributes to Congress the implausible intent to ascribe one meaning to Section 309(d) of the Act in the case of citizen suits and another meaning to the same section in the case of governmental enforcement actions. Section 505(a) ex-

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[6]Petitioner contends (Pet. 12-13) that the issue of the Administrator's authority to seek civil penalties for past violations is not presented in this case and that the Court should therefore disregard the cases holding that the Administrator does indeed possess such authority. But there is no reason for the Court to disregard judicial constructions of other sections of the Act that use language identical to that contained in Section 505(a) in evaluating petitioner's argument that the "plain meaning" of the words used in that Section prohibit citizens from seeking civil penalties for past violations.

pressly authorizes courts hearing citizen suits to assess civil penalties under Section 309(d), the same provision that authorizes the assessment of such penalties in suits brought by EPA. There is no reason to suppose that Congress intended "two radically different interpretations [of Section 309(d)], one for citizen suits and one for EPA suits." Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. at 1198.

Furthermore, petitioner's contention (Pet. 15-16, 25) that citizens may obtain only injunctive relief is at odds with both the language of Section 505(a), authorizing the assessment of civil penalties, and common sense. As the court reasoned in Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. at 1198-1199:

> The whole idea that Congress might have empowered citizens to seek civil penalties only prospectively is rather odd. Penalties are necessarily imposed on past violations. *** Citizen suits can certainly seek injunctive relief. The courts are fully empowered to impose sanctions for contempt, sanctions greater than those available under Section 1319(d). Thus, the theory of defendants and of the Hamker court would require us to believe that the provision empowering courts to enforce citizen suits with civil penalties was superfluous.

b. In addition to maintaining fidelity to the overall structure of the Act, the court of appeals' construction of Section 505(a) is fully supported by the only pertinent legislative history.[7]

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[7] In light of the ambiguity in the statutory language, petitioner's reliance (Pet. 8) on the "plain meaning rule" is misplaced. Cf. Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 10 (1976) (quoting United States v. American Trucking Associations, Inc., 310 U.S. 534, 543-544 (1940)) ("'[T]here certainly can be no "rule of law" which forbids [reference to legislative history], however clear the words may appear on "superficial examination."'").

Senator Muskie, the principal architect of the Act, explained that citizen suits are authorized "in the case of any person who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one." 118 Cong. Rec. 33700 (1972) (emphasis added).[8] The legisla-

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[8] Petitioner attempts to discredit Senator Muskie's clear explanation of Section 505 by categorizing it as "a stray comment by one legislator" (Pet. 16). But the court of appeals correctly recognized that Senator Muskie's statements about the Clean Water Act may not be so lightly dismissed (Pet. App. 14a n.13):

> Because of his crucial role in the drafting and sponsorship of the bill that became the Clean Water Act, we give his comments significant weight. Other courts too have had occasion to rely on Muskie's remarks regarding the intent and meaning of the Act. See, e.g., American Frozen Food Institute v. Train, 539 F.2d 107, 118-20 (D.C. Cir. 1976) (quoting extensively from

tive history also refutes petitioner's argument (Pet. 13) that citizen suits were somehow viewed as less important than governmental enforcement actions.

(Footnote Continued)

> Muskie's comments as an aid to interpreting sections 301 and 304 of the Act); American Meat Institute v. EPA, 526 F.2d 442, 451-52 (7th Cir. 1975) (relying on written comments by Muskie, as "the principal author of the Act").

At the same time that it erroneously dismisses Senator Muskie's authoritative interpretation of Section 505, petitioner asks the Court to rely on various remarks in the Act's legislative history that describe citizen suits as "abatement" proceedings (See Pet. 15-16 & n.9). The court of appeals appropriately recognized (Pet. App. 13a-14a) that none of the passages cited by petitioner states that "abatement of ongoing violations is the only relief available under Section 505(a)." Thus, the legislative history relied upon by petitioner simply does not address the question presented. Senator Muskie's statement, on the other hand, speaks directly to the point at issue.

As the Senate Report explained (S. Rep. 92-414, 92d Cong., 1st Sess. 64 (1971)), "[i]t should be noted that if the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action under the citizen suit provisions of Section 505." Thus, nothing in the legislative history supports petitioner's denigration of the role of citizen suits in Congress's overall enforcement scheme.[9]

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[9] There are distinctions between citizen suits and governmental enforcement actions, but those distinctions only highlight the fact that petitioner's narrow construction of Section 505(a) is not one of them. As the court of appeals explained (Pet. App. 11a (citation omitted)):

> Section 505(b), 33 U.S.C. Section 1365(b), provides that no citizen suit may be commenced less than sixty days after the plaintiff has given notice of an alleged violation to the Administrator,

c. The decision below avoids the near-total emasculation of the citizen suit provision that follows from petitioner's argument. There is neither evidence nor logic to support petitioner's contention that Congress meant to authorize expensive and time-consuming pre-

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(Footnote Continued)

> the state in which the violation occurs, and the alleged violator. The section also prohibits filing of a citizen suit if either the Administrator or the state has commenced and is diligently prosecuting a civil or criminal action in federal or state court. In such cases, however, a citizen is permitted to intervene as a matter of right. These provisions have been narrowly construed by the courts* * *, and the Act contains no other express limits on institution of citizen suits. We read the statute as requiring only those limits on citizen suit jurisdiction that Congress expressly provided; we see no reason to impose by implication limits which Congress could have, but did not, create.

paration for litigation that could be thwarted "the day, the hour, or the minute before a suit is filed." Sierra Club v. Simkins Industries, Inc., 617 F. Supp. 1120, 1132 (D. Md. 1985). Indeed, the instant case well illustrates the illogic of petitioner's position. Petitioner does not contend that respondents could have known that petitioner's permit violations, which had been ongoing for years, suddenly ceased before suit was filed. Because of the time necessary for a polluter to analyze its discharges, obtain laboratory reports, and prepare and submit its DMRs, violations typically are not reported until at least a month after they have occurred. Accordingly, it would be physically impossible for anyone other than the polluter to determine whether, on any given day, its

discharges were in violation of its permit limitations. For this reason, one court has concluded that "Congress could not conceivably have meant that the violations literally be ones occurring at the time the citizen suit is filed." Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. at 1194.

2. a. Contrary to petitioner's contention (Pet. 9-10), the decision below in no way conflicts with this Court's decision in Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981). In Sea Clammers, the Court held that the comprehensive enforcement scheme contained in the Clean Water Act, including the citizen suit provision, leaves no room for implied private damages actions. The Court's concern was with the scope of

relief available to private persons outside that which is authorized by Section 505, not with the coverage of Section 505 itself.[10] It was in this context that the Court stated, in dicta, that Section 505 "authorizes only prospective relief" (453 U.S. at 6) and that citizens "may sue for injunctions" to enforce the Act (Id. at 14). The Court had no occasion to consider the scope of relief available under Section 505 itself, and nothing in Sea Clammers holds that citizen suits seeking civil penalties for past violations are pro-

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[10] The same situation occurred in City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980), in which the plaintiffs sought to recover compensatory damages for themselves for defendant's past violations of the Act, not civil penalties for the United States Treasury. The court rejected this private remedy.

hibited. To the contrary, the Court noted that, in addition to injunctive relief, "civil penalties, payable to the Government, also may be ordered by the court. Section 505(a), 33 U.S.C. Section 1365(a)." 453 U.S. at 14 n.25. The Court also clearly recognized that citizens are authorized to act as "private attorneys general" (Id. at 13-17) in the event that government agencies fail to act.[11]

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[11] Petitioner's reliance (Pet. 14) on the Court's characterization in Sea Clammers of citizen suits as being of a "limited nature" (453 U.S. at 17 n.27) has no applicability to this case. The Court found support for that conclusion in the parallel--but not identical--citizen suit provision contained in the Clean Air Act, 42 U.S.C. 7604. Significantly, the Clean Air Act does not authorize the imposition of civil penalties in citizen suits, whether the penalties are for past or continuing violations; instead, only injunctive relief is authorized. Section 505(a) of the Clean Water Act, on the other hand, expressly authorizes courts to impose ci-

b. Petitioner relies most heavily on an asserted conflict between the decision below and the Fifth Circuit's decision in Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392 (5th Cir. 1985). Although the court below did state (Pet. App. 15a) that it disagreed with Hamker, the two cases present such different facts that it would not be appropriate to attempt a reconciliation of the two decisions here.

Hamker, like Sea Clammers, was essentially a damages action, although the plaintiffs in Hamker attempted to cloak their case in the garb of a citizen suit

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(Footnote Continued)

vil penalties. This distinction was explained by the Court in Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. at 1195-1196 & n. 1.

under Section 505(a). Hamker involved a single discharge, an oil leak from a pipeline, that lasted about two weeks before it was detected and stopped. 756 F.2d at 394. Plaintiffs sought injunctive relief and civil penalties under the Clean Water Act and compensatory and punitive damages based on pendent state law claims. Id. The court held that subject matter jurisdiction under Section 505(a) was lacking, construing the Act as authorizing only those citizen suits that allege an ongoing violation of an effluent standard, limitation, or order imposed under the statute. 756 F.2d at 395, 396, 398-399. The majority opinion emphasized not only the fact that the alleged violation was limited to a single occurrence, but also that plaintiffs had failed even to allege that isolated event violated any effluent

standard, limitation, or order imposed under the Act (Id. at 396-397). The concurring opinion stressed "the narrow applicability of the holding of the Court" (Id. at 399 (Williams, J., concurring)). Judge Williams elaborated as follows (Id.):

> I would urge that the requirement that the polluter be "in violation" clearly is broad enough to cover the chronic episodic violator or the violator who intentionally "turns off the spigot" just before a citizen brings suit. In either of these circumstances, the statute should surely be interpreted to cover such violations as being current. Such circumstances are not at all the same as this case, so I wish to emphasize the difference between a single past event and a course of polluting conduct where continuity happens to be broken at the time citizen complaint is made and pursued. In the latter situation, the polluter is "in violation".

Here, unlike the situation in Hamker, petitioner violated its permit at least 160 times over the 22 months pre-

ceding the filing of suit (Pet. App. 45a n.12). Nothing in the Fifth Circuit's opinion suggests that it would have reached the result it did had it been confronted with a comparable situation, in which respondents could not have known at the time the complaint was filed that years of violations had suddenly ceased. In these circumstances, review of the conflict alleged by petitioner should await the consideration by the Fifth Circuit of a case presenting the issue here raised in a more closely analogous factual setting. Six citizen suits raising the question presented here on facts similar to the instant case are pending on appeal in the Fifth Circuit,[12] and that court should be

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[12] Sierra Club v. Shell Oil Co., No. 84-3583 (E.D. La. 1986), appeal pending, No. 85-3753 (5th Cir.); Sierra

given the opportunity to elucidate further its ruling in Hamker. The result may well be a decision to confine Hamker to its atypical facts, thereby obviating

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(Footnote Continued)

Club v. Monochem Inc., No. 84-147B (M.D. La. 1985), appeal pending, No. 85-3762 (5th Cir.); Sierra Club v. Copolymer Rubber & Chemical Corp., 621 F. Supp. 1013 (M.D. La. 1985), appeal pending, No. 85-3763 (5th Cir.) (four consolidated cases). In each of these cases, the polluters' DMR's showed violations subsequent to the filing of suit as well as before. That distinction, however, has no bearing on the jurisdictional issue presented. Clearly, subject matter jurisdiction cannot be made to turn on events that do not occur until after a complaint is filed. Were the rule otherwise, the court and the parties would have to wait some unknown period of time after the initiation of a suit to determine whether jurisdiction existed. Thus, the critical issue to be decided in the pending Fifth Circuit appeals is whether there must be a violation occurring on the date the complaint is filed. The Fifth Circuit's resolution of that question, in the context of cases alleging violations that occurred shortly before suit was filed, will thus require it to consider the same factual situation addressed by the court below.

the need for review by this Court. Cf. E. I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 135 n.26 (1977) ("This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration in the courts of appeals.").

The possibility that the Fifth Circuit may narrow or refine its decision in Hamker is not at all speculative in light of the fact that, with the exception of district courts within the Fifth Circuit bound to follow Hamker, virtually every court to consider the Fifth Circuit's decision has rejected it. See Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 286-287 (N.D.N.Y. 1986); Connecticut Fund for the Environment v. Job Plating Co., 623 F. Supp. 207, 213-214 (D. Conn. 1985); Sierra

Club v. Simkins Industries, Inc., 617 F. Supp. at 1131-1134; Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. at 1194-1199; Student Public Research Group v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1425-1426 (D.N.J. 1985). [13] We therefore suggest that review of the issue by this court would be premature at this time.

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[13] Petitioner notes (Pet. 22-23 n.15) the existence of 18 district court decisions that have addressed the issue here presented, but it fails to point out that, outside the Fifth Circuit, only a single court has accepted its position. That case, Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 21 Env't Rep. Cas. (BNA) 1393 (D.R.I. 1984), 22 Env't Rep. Cas. (BNA) 1999 (D.R.I. 1985), appeal pending, No. 86-1227 (1st Cir.), merely cites Hamker and contains no independent analysis. In addition, the complaint in Pawtuxet, like the complaint in Hamker but unlike the complaint here, did not allege any continuing violations. 22 Env't. Rep. Cas. at 2000. Significantly, the complaint in Pawtuxet, like the complaint in Hamker, also sought

c. In addition to the fact that the Fifth Circuit may wish to reconsider or expressly limit Hamker, review of the issue presented is not warranted in this case because the judgment may be harmonized with Hamker under the alternative rationale noted by the district court (Pet. App. 38a-39a n.8) and urged by the United States as amicus curiae in the court below. As previously noted, Section 505(a) authorizes citizen suits against persons alleged to be in violation of the Act. The district court reasoned that, even if petitioner's

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(Footnote Continued)

damages, in addition to other relief. 21 Env't Rep. Cas. (BNA) at 1394-1396 (D.R.I. 1984). In any event, the decision is of limited precedential value in light of the pendency of an appeal in which the First Circuit will resolve the jurisdictional question not only for the District of Rhode Island but for the entire Circuit.

theory with respect to past violations were accepted, a complaint that alleged in good faith the existence of continuing violations would not be subject to dismissal upon later discovery that the violations had ceased prior to suit (Pet. App. 38a-39a n.8). Although the court of appeals did not rely on this rationale (Id. at 7a-8a n.9), "'this Court reviews judgments, not opinions.'" Bowen v. American Hospital Association, 106 S. Ct. 2101, 2112 n.11 (1986) (quoting Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842 (1984)). In Hamker, no good faith allegation of a continuing violation was made, nor would one have been possible in light of the facts. In the instant case, by contrast, there is no serious question that respondents' allegations of continuing violations

were made in the utmost good faith.[14] Thus, petitioner has failed to show that review of the judgment below would product a different result.

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[14] Petitioner contends (Pet. 20-21) that here, as in Hamker, the only allegations were that violations of the Act might occur in the future. In Hamker, however, such allegations were wholly speculative, while in the instant case respondents relied on a history of years of continuing violations that, so far as the public records demonstrated, had not been abated at the time suit was brought.

We note also that petitioner's emphasis (Pet. 21 nn. 12 & 13) on the fact that the parties stipulated that petitioner's last violation occurred on May 15, 1984, does not defeat the logic of the district court's alternative rationale. The stipulation was, of course, entered after the good faith allegations in the complaint were made, and it cannot alter the fact that, when suit was initiated, the only publicly available information indicated that petitioner was still in violation of its permit limitations.

3. Finally, petitioner raises a "parade of horribles" if its construction of Section 505(a) is not adopted. Petitioner's arguments are based on sheer speculation having nothing to do with the facts of this case. For example, petitioner relies on the Hamker court's concern that allowing citizen suits for past violations would place an undue burden on the federal courts by permitting all state damages claims that could be brought under pendent jurisdiction to be litigated in a federal forum. Hamker, 756 F.2d at 396. While that may have been a legitimate concern in Hamker, in which plaintiffs sought both compensatory and punitive damages, no state law claims were ever raised in this case. Moreover, other than Pawtuxet Cove Marina Inc. v. Ciba-Geigy Corp,

supra note 13, of the 18 district court decisions cited by petitioner (Pet. 22-23 n.15), only one even suggests that a pendent state law claim may have been raised. See Sierra Club v. Copolymer Rubber & Chemical Corp., 621 F. Supp. at 1016 n.13. In any event, the court of appeals correctly recognized that, under the principles established in United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), a district court "would be acting within its discretionary autority in refusing to exercise jurisdiction over state law damage claims" (Pet. App. 17a).[15]

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[15] Petitioner also suggests (Pet. 24) that citizens will be encouraged to bring damages actions disguised as citizen suits in order to recover attorney fees for their state law claims. Petitioner, like the court of appeals in Hamker, fails to offer any support for the notion that the Clean Water Act's attor-

In another makeweight argument, petitioner suggests (Pet. 25) that excessive numbers of citizen suits will disserve the policies of the Clean Water Act by interfering with the "primary enforcement responsibility" of EPA and the States. This assumption is flatly at odds with Congress's intent in enacting Section 505. As the Senate Report explained (S. Rep. 92-414, supra at 80):

> The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same. Therefore, the participation of citizens in the courts seeking enforcement of water pollution control requirements should not result in inconsistent policy.

(Footnote Continued)

ney fee provision, 33 U.S.C. 1365(d), necessarily extends to attorney fees incurred in the pursuit of pendent state law claims. Cf. Hensley v. Eckerhart, 461 U.S. 424, 434-435 (1983).

In fact, petitioner makes no credible case that citizen enforcement powers are not being responsibly employed, nor could it do so if it tried.[16] Citizen enforcement is working very well, as documented in a recent Senate Report and a study performed for the Environmental Protection Agency. See S. Rep. 99-50, 99th Cong., 1st Sess. 28

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[16] Petitioner argues (Pet. 24-25 n.18) that "[i]t is common knowledge in the industry" that many defendants settle citizen suits by making contributions to the plaintiff groups bringing the suits or to projects sponsored by those groups. Nothing of the sort occurred here; the nearly $1.3 million in civil penalties assessed by the district court will be paid to the United States Treasury. Moreover, the authority petitioner cites for the "common knowledge in the industry" consists of three letters received by a single attorney who then wrote an article on the general subject of citizen suits. See Schwartz & Hackett, Citizen Suits Against Private Industry Under the Clean Water Act, 17 Natural Resources Lawyer 327, 328 & n.6, 360-365 (1984).

(1985);[17] Environmental Law Institute, Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes, at V 5-11 (Sept. 1984). Finally, the participation of the United States as amicus curiae in a number of

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[17] Petitioner quotes from the Senate Report out of context. It is true, as petitioner notes (Pet. 22), that the Report remarked on the increase in the number of citizen suits filed in recent years, but petitioner attempts to convey the totally inaccurate impression that that increase is at odds with congressional intent. In fact, however, the Report states in three sentences preceding the sentence quoted by petitioner (S. Rep. 99-50, supra, at 28):

> Citizen suits are a proven enforcement tool. They operate as Congress intended--to both spur and supplement to [sic] government enforcement actions. They have deterred violators and achieved significant compliance gains.

these cases, including the instant one, demonstrates the total lack of foundation for petitioner's fear of a great number of frivolous citizen suits working any interference with EPA's primary enforcement authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER 1986

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CHESAPEAKE BAY FOUNDATION, INC., and NATURAL RESOURCES DEFENSE, Plaintiffs,	)	Civil Action No.
v.	)	84-0366-R
GWALTNEY OF SMITHFIELD, LTD., Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AS STATED FROM THE BENCH

BEFORE: Honorable Robert R. Merhige, Jr.,
United States District Judge

Richmond, Virginia

August 28, 1984

THE COURT: This is a motion by plaintiffs for partial summary judgment, on the issue of liability, in a "citizens' suit" to enforce certain requirements of the Clean Water Act, 33 U.S.C. § 1311 et. seq. (the Act), against a food-processing facility. No effort was made to set up a factual issue that was not present; there are no factual issues here. The matter is ripe for summary judgment.

The first of two plaintiffs here, Chesapeake Bay Foundation, is a non-profit organziation organized under the laws of Maryland. Its principal place of business is in Annapolis, and it has an office in Richmond. It is a regional conservation organization with thousands of members in the Chesapeake Bay area. Some of its members reside in Virginia in the vicinity of the Pagan

River, and they use and enjoy the river and the water system. (All this is set forth in plaintiffs' uncontested affidavits.)

The Court finds that the quality of the nation's waters and waters of the Commonwealth directly affects the health, recreation and esthetic environmental interests of that organization and its members.

The Court finds that the interests of that organization and its members have been, are being, and will be adversely affected by the failure of defendant, Gwaltney of Smithfield, Limited (Gwaltney), to comply with its National Pollution Discharge Elimination System (NPDES) permit.

The second plaintiff, Natural Resources Defense Council, is a non-profit membership organization organized

under the laws of the State of New York with offices in New York, Washington and San Francisco. It has over seven hundred individual members within the Commonwealth of Virginia. They, like the members of the Chesapeake Bay Foundation, utilize the river and are affected by Gwaltney's failure to comply with its NPDES permit. (This, too, is by uncontested affidavit).

Jurisdiction in the case is pursuant to 33 U.S.C. Section 1365(a)(1); the Court finds from the uncontradicted evidence that on October 23, 1974, the Virginia State Water Control Board issued, to the defendant, NPDES Permit Number VA 0002844, pursuant to VA. Code Section 62.1-44.15, Section 402 B. of the ACT, and an approval of Virginia's program by the Administrator of the United States Environmental Protection Agency

under Section 402 of the Act, 33 U.S.C. § 1343, dated March 31, 1975.

The permit was reissued on October 23, 1979, modified by the addition of a TKN limitation on August 1, 1980, and it has remained in effect to this date.

The defendant's monthly reports under its permit, which are required to be filed, reflect that between January 1979 and June 15, 1984, it has on at least 237 occasions discharged substances into the Pagan River, which is a tributary of the James River and Chesapeake Bay, in excess of the amounts allowed by its permits. Defendants' monthly reports may be used to establish civil liability under the Act. See, e.g., United States v. Ward, 448 U.S. 242 (1980).

Under 33 U.S.C. 1131(a), any

discharge is unlawful unless it is authorized by one of several specified sections of the Act, including Section 402(b) of the Act, 33 U.S.C. 1342(b). Section 402(b) provides that compliance with the permit issued pursuant to this section shall be deemed compliance with Section 301 of the Act, 33 U.S.C. § 1311; for purposes of enforcement under Section 309 of the Act, 33 U.S.C. § 1319, or under Section 505 of the Act, 33 U.S.C. § 1365.

Without more, then, to violate an NPDES permit condition is to violate the Act. E.P.A. v. State Water Resource Control Board, 426 U.S. 200, 205, (1976), Natural Resources Defense Council v. Costle, 568 F.2d, 1369, 1374-77 (D.C. Circuit 1977).

There being no genuine issue as to any material facts, the plaintiffs

are entitled to summary judgment in the form of a declaration that the defendant has violated the Act, for which it must be held liable. It is so ORDERED.

Gentlemen, we might just as well set it down for whatever else you want to do with it. I will see you in chambers. Thank you for your help.

Supreme Court, U.S.
FILED
DEC 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,

and

NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR THE PETITIONER

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1. The court below held that "citizen suits *like the one at bar*, seeking civil penalties for permit violations committed entirely in the past, are permitted" under the Clean Water Act. App. 17a (emphasis supplied). The Fifth Circuit in *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392, 395 (1985), held to the contrary that a citizen plaintiff "must allege a violation occurring at the time the complaint is filed." Respondents stipulated in this case that the last violation occurred a full month before the suit was filed. App. 6a n.7, 7a, 86a, 93a. Both the Court of Appeals and the District Court below recognized that their holdings were contrary to the holding

of the Fifth Circuit in *Hamker*. *See* App. 8a, 15a, 39a-40a. In light of the foregoing, respondents' efforts to mitigate the direct and irreconcilable conflict between the decision below and *Hamker* are completely unavailing.[1]

It is not surprising that respondents do not once quote from the opinion of the Fifth Circuit in *Hamker*, relying instead on the brief concurring opinion of Judge Williams. Br. in Opp. at 33. They fail to note, however, that Judge Williams began his comments by emphasizing that the court's opinion "carries my full concurrence." 756 F.2d at 399.[2] Nor does Judge Williams's opinion in any way serve to distinguish the present case from *Hamker*. Judge Williams wrote separately simply to note that the term "in violation" should encompass "the violator who intentionally 'turns off the spigot' just before a citizen brings suit." *Id.* Such facts are not present here, and neither the District Court nor the Court of Appeals suggested that they were. Far from "turning off the spigot," Gwaltney continues to discharge appropriately treated effluent into the Pagan River, pursuant to its permit. Gwaltney attained compliance with the Act because it installed a new, state-of-the-art wastewater treatment system. Gwaltney began planning that system *two years* before respondents filed suit, Ct. App. Ex. Vol. at 353-381, and completed construction of the system *eight months* prior to suit. Ct. App. JA at 97. Chlorine violations had ceased *twenty months* prior to suit. *See*

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[1] The principal authority on which respondents rely is *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 617 F. Supp. 1190 (D.N.J. 1985), repeatedly cited in their brief. *See* Br. in Opp. at 16, 17, 19, 21, 22, 28, 31, 37. That District Court decision cannot, of course, diminish the conflict between the Fourth and Fifth Circuits, and the court in that case expressly recognized that its holding was contrary to *Hamker*. 617 F. Supp. at 1194-95, 1198-99.

[2] Respondents thus err in referring to the court's opinion as a "majority opinion." The opinion in *Hamker* was unanimous.

App. 87a. Respondents' suggestion that Gwaltney undertook these substantial capital improvements as a means of "turning off the spigot" to avoid a citizen suit that would not be filed for many months ascribes to Gwaltney a degree of clairvoyance for which there is no support in the record.[3]

2. Respondents suggest that the *result* below and the result in *Hamker* can be reconciled on the basis of a theory expressly rejected by the court below. According to respondents, even if a continuing violation is required under the citizen suit provision, jurisdiction can be found in this case because they made a good-faith allegation of a continuing violation. Br. in Opp. at 38-40. The court below, however, not only declined to accept this theory but also declined to decide if in fact respondents had made a good-faith allegation of continuing violation. App. 7a-8a n.9. Obviously no such allegation could be made with respect to chlorine violations, which ceased twenty months prior to suit. App. 87a. Nor could any such allegation be made with respect to TKN violations, since it was evident before suit was filed that Gwaltney's new system would achieve compliance with the Act, as in fact it did. Two months before respondents filed suit, the State Water Control Board recognized, as a result of Gwaltney's capital improvements, that "the violations * * * are under control," Ct. App. Ex. Vol. at 425, and in fact—as respondents stipulated—the last violation occurred a month

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[3] Respondents seriously mischaracterize petitioner's position. Contrary to respondents' assertion, Gwaltney does not contend that "citizens may obtain only injunctive relief." Br. in Opp. at 21. If a citizen suit is properly before a court—because the defendant was "in violation" of the Act when suit was filed—then the court may impose civil penalties. As was clearly stated in the Petition, "there is no jurisdiction for a citizen suit unless the suit concerns an ongoing violation," but "once such a suit is before a court it may order civil penalties." Pet. at 15.

prior to suit.[4] In light of the foregoing it is difficult to see how any allegations of ongoing violations could have been made in good faith.

Nor, in any event, would acceptance of respondents' theory reconcile the decision below with *Hamker*. Plaintiffs in *Hamker* also alleged that the defendant's conduct would result in future violations of the Act, 756 F.2d at 394, 397-398, and lower courts applying *Hamker* have recognized that jurisdiction cannot be sustained on the basis of mere allegations. *See* Pet. at 21 & n.13.

3. Respondents urge that the present case would not serve as an "appropriate vehicle" for resolving the conflict between the decision below and *Hamker*. Br. in Opp. at 15. In support of this contention, they suggest that the facts of the two cases are somehow distinct. With respect to the issue over which the Fourth and Fifth Circuits split, however, the cases are indistinguishable. The question petitioner presents to this Court is whether citizen suits may be brought under the Clean Water Act seeking civil penalties for purely past violations. The violation in *Hamker* clearly ceased prior to suit. *See* 756 F.2d at 394. In the present case, respondents *stipulated*

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[4] Respondents' suggestion that the Board was somehow misled is wholly unfounded. Br. in Opp. at 7-8 n.4. Contrary to respondents' assertion, Gwaltney officials testified not that Gwaltney was "in compliance" at the March 25-26, 1984 public hearing, but rather that there had been "no violations of TKN" since the last reported violations. Ct. App. Ex. Vol. at 422. That statement was entirely accurate. Gwaltney in fact had no violation of daily TKN limits in March, and while there was a violation of the monthly average limit, by its nature such a violation cannot be determined until the end of the month—after the meeting in question. *See* App. 73a. Gwaltney officials fully and accurately described the functioning of the new wastewater treatment facility at the hearing, and at the end of the hearing the Board—which had been continuously and actively involved in the design, installation, and operation of the system—declined to take any enforcement action. Ct. App. Ex. Vol. at 425.

that the last violation by Gwaltney also occurred a full month prior to suit. App. 6a n.7, 7a, 86a, 93a. The legal issue is thus starkly presented. The stipulations remove all factual disputes and make this case an ideal vehicle for resolving the direct conflict between the Fourth and Fifth Circuits.

4. Respondents also suggest that this Court should permit the conflict between the Circuits to persist, in the hope that the Fifth Circuit may change its mind. Br. in Opp. at 34-37. There are, as respondents note, cases presenting this issue pending before the Fifth Circuit; there are also similar cases at various stages in the Fourth Circuit and elsewhere around the country. There is no more reason to suppose that the Fifth Circuit will dramatically overturn a precedent only one year old than there is to suppose that the Fourth Circuit will reverse its ruling in this case. The fact that cases presenting this issue are pending in the lower courts, *see* Pet. at 22-23 n.15, simply highlights the need for guidance from this Court on whether the Fourth Circuit or the Fifth Circuit correctly interpreted the statute.

Respondents concede that the cases pending before the Fifth Circuit do not even involve the same fact situation as that in *Hamker*. In those cases, the discharge reports "showed violations subsequent to the filing of suit as well as before." Br. in Opp. at 35 n.12. In both *Hamker* and this case, the violations ceased prior to suit. *See* 756 F.2d at 394; App. 6a n.7, 7a, 86a, 93a. It is thus difficult to discern how any decision by the Fifth Circuit in the appeal pending before it could mitigate the conflict between the decision below and *Hamker*.

5. Finally, respondents contend that serious practical difficulties would result from reading the statute—as written by Congress—to permit citizen suits only against those alleged "to be in violation" of the Act. According to respondents, the lag time in the filing of discharge

monitoring reports means that citizen plaintiffs can never be certain if a violation is occurring when they file suit. Therefore, respondents reason, jurisdiction should be found even if the defendant is not in fact "in violation" when suit is filed, to avoid thwarting the plaintiffs' "expensive and time-consuming preparation for litigation." Br. in Opp. at 26-27. This purported problem only arose in this case, however, because Gwaltney achieved compliance with the Act before suit was filed. It seems a curious argument that the parties and the courts should be put through the expense and time of a full trial—when the objectives of the Clean Water Act have already been achieved—simply to avoid "thwarting" the expense and time allegedly incurred in *preparation* for trial.

Respondents plainly exaggerate the expense and time involved. Although they allege, without citation of any authority, that "violations typically are not reported until at least a month after they have occurred," Br. in Opp. at 27, the record in this case demonstrates that Gwaltney's reports were typically completed about *one week* after the end of the covered month. Ct. App. Ex. Vol. at 312-350. Plaintiffs in citizen suits can thus promptly learn whether a continuing violation exists, without any waste of litigation resources. And the expense and time involved in filing a complaint in these cases is virtually nonexistent. The entire case turns on the discharge monitoring reports furnished by the defendants themselves, which generally suffice to establish a violation of the Act. *See* Pet. at 23-24. The remarkable ease of filing such suits makes the wait of one week for a current discharge monitoring report a truly insignificant burden, particularly since jurisdiction will only be lacking when—as here—the defendant has already achieved full compliance with the Act.

Respondents' contentions do nothing to mitigate the direct conflict between the decision of the Fourth Circuit below and that of the Fifth Circuit in *Hamker*. This

Court should grant the writ to resolve this conflict over the proper interpretation of the jurisdictional provision of an important Federal statute.

Respectfully submitted,

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and

NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

SUPPLEMENTAL BRIEF

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL BRIEF

Petitioner, Gwaltney of Smithfield, Ltd., submits this supplemental brief pursuant to Supreme Court Rule 22.6 to call to the attention of the Court a recent decision on the same question as that presented in the Petition. On December 18, 1986, the First Circuit issued its opinion in *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, No. 86-1227. A copy of the opinion is attached. The First

Circuit affirmed the dismissal of a citizen suit seeking civil penalties for past violations under the Clean Water Act, noting that the "draftsmanship" of the citizen suit provision "leaves something to be desired." App. at 5a.

In dismissing the citizen penalty action, the First Circuit expressly rejected the "unlimited meaning [of the statute] adopted by the Fourth Circuit" in the case presently before this Court. *Id.* The First Circuit found the argument of the Fourth Circuit "forced" and the analogy drawn by the Fourth Circuit "inapt." *Id.* The First Circuit concluded: "With great respect to the Fourth Circuit, we find its conclusion of ambiguity unpersuasive, particularly when it would have been so easy for Congress to have said 'has violated,' instead of 'is * * * in violation' if the former was its intention, and with the difference being so conspicuous." *Id.* at 6a.

The First Circuit adopted a *third* interpretation of the citizen suit provision, different from that of the Fourth Circuit below and different from that of the Fifth Circuit in *Hamker* v. *Diamond Shamrock Co.*, 756 F.2d 392 (5th Cir. 1985). As the First Circuit recognized, its interpretation of the statute "lies somewhere between an absolute, literal, application of its language and the unlimited meaning adopted by the Fourth Circuit." App. at 5a. The First Circuit, however, expressly noted that it agreed with the result in *Hamker*. App. at 9a.

This recent decision of the First Circuit confirms the need for this Court to grant certiorari in this case to resolve the worsening conflict among the Circuits over the proper interpretation of the citizen suit provision of the Clean Water Act. Another Circuit has expressed its disagreement with the reasoning of the court below, adding a third interpretation to the direct conflict that previously existed. This Court should grant the writ to re-

solve this conflict over the proper interpretation of the jurisdictional provision of an important Federal statute.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 86-1227

PAWTUXET COVE MARINA, INC., *et al.*,
Plaintiffs, Appellants,

v.

CIBA-GEIGY CORPORATION,
Defendant, Appellee.

Appeal from the United States District Court
for the District of Rhode Island
[Hon. Bruce M. Selya, *U.S. District Judge*]

Before

Campbell, *Chief Judge*,
Aldrich and Coffin, *Circuit Judges*.

Jeffrey A. Lanphear for appellants.

James Thornton on brief for Natural Resources Defense Council, Inc., amicus curiae.

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December 18, 1986

ALDRICH, *Senior Circuit Judge.* In 1979 plaintiff Pawtuxet Cove Marina, Inc., purchased a marina on a cove by the mouth of the Pawtuxet River in Rhode Island. Plaintiffs Russell and Beverly Hunt, owners of a residence on the cove, as well as officers and shareholders in Marina, Inc., purchased a second marina on the cove and leased it to Marina, Inc. In November 1983 plaintiffs sued defendant Ciba-Geigy Corp., in part for civil penalties under section 505 of the Clean Water Act, 33 U.S.C. § 1365, and in part for damages due to violations of Rhode Island common law. Defendant was located up river. From the penalty standpoint it, allegedly, had violated its permit under the National Pollutant Discharge Elimination System by discharging effluents containing excessive pollutants. From the damage standpoint the presence of these pollutants had, allegedly, prevented dredging to improve access to plaintiffs' properties, causing economic loss and, in turn, stress-produced illnesses. On defendant's motion for summary judgment the court dismissed the penalty action for lack of jurisdiction. Diversity jurisdiction existed for the damage claims. However, upon plaintiffs' stipulating during trial that these, unless for nominal damages, which they waived, depended upon proof that the dredging would have occurred but for defendant's polluting, the court ruled that plaintiffs had not made out a case. Plaintiffs appeal. We affirm.

The Pawtuxet River area silts up. In the early 1960's an agreement was entered into whereby the Army Corps

of Engineers, funded by federal, state, and municipal contributions, dredged it to a depth of six feet at mean low water. A breakwater was built for protection, which, unfortunately, increased siltation, and it was recognized that substantial periodic dredging would be required for maintenance. This expectation proved to be correct, but further dredging, though long needed, has not taken place. Indeed, one of the municipalities did not even fulfill its original obligations.

The principal impediment to maintenance dredging was the cost; everyone being in favor of the project, provided someone else paid. While discussions still continue, no money has ever been appropriated, federal or otherwise, nor have plaintiffs shown any appreciable prospect thereof. The problem was aggravated by a Rhode Island regulation passed in the early 1970's forbidding dumping of dredged materials in offshore waters. Since then a lack of disposal space has precluded almost all Rhode Island dredging, even of needed terminal facilities, let alone of recreational areas. It is true that some neighbors of possible disposal sites have objected to defendant's pollutants, but we agree with the district court that as a matter of law on the overall record this was an insignificant, and in no sense a "but for" factor. *Brodeur* v. *Desrosiers*, 505 A.2d 418, 423 (R.I. 1986); *Salk* v. *Alpine Ski Shop, Inc.*, 115 R.I. 309, 312-13, 342 A.2d 622, 625 (1975). Twenty years of negative history, quite apart from defendant's pollutants, with no indication of any change, left plaintiffs with nothing but hope. This was clearly insufficient to make out a case against defendant.

In this circumstance we need not consider plaintiffs' other common law obstacle, that actions for negligence generally require proof of physical, as distinguished from mere economic, harm. *Cf. Barber Lines A/S* v. *M/V Donau Maru*, 764 F.2d 50 (1st Cir. 1985); *Louisiana ex rel. Guste* v. *M/V Testbank*, 752 F.2d 1019 (5th Cir.

1985), *cert. denied*, 106 S. Ct. 3271. *But cf. Burgess* v. *M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973), *aff'd without opinion*, 559 F.2d 1200 (1st Cir. 1977) (permitting fishermen to recover for pecuniary losses caused by oil spill).

We turn to the more open question, the district court's ruling that plaintiffs, as private citizens, could not maintain a Clean Water Act action simply to enforce penalties with respect to violations that had already ceased. Plaintiffs' complaint was, of necessity, limited to the past ("has discharged effluents"), because of the fact that, prior to its filing, defendant had completed a tie-in with a municipal treatment facility and had ceased operating under the permit. Plaintiffs, accordingly, did not and could not, at least prima facie, trace the statutory language, which is addressed to the present.

> Sec. 505(a). Except as provided in subsection (b) of this section, any citizen[1] may commence a civil action on his own behalf—
>
> > (1) against any person . . . *who is alleged to be in violation* of (A) an effluent standard or limitation under this Act . . . . The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act. (emphasis added)

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[1] A citizen is defined in subsection (g) as a "person or persons having an interest which is or may be affected." Since we dismiss on other grounds, post, we need not decide whether plaintiffs succeeded in showing such. See discussion in *Chesapeake Bay Foundation* v. *Bethlehem Steel Corp.*, 608 F. Supp. 440 (D.Md. 1985).

While this failure might seem a short and conclusive answer, plaintiffs cite district court cases, culminating with the recent case of *Chesapeake Bay Foundation, Inc.* v. *Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), holding that the court not only may assess penalties for past violations in a citizen's suit (which, in itself, we do not question), but may entertain a suit seeking only that relief. Plaintiffs also cite language by Senator Muskie, post, one of the proponents of the Act, purportedly indicating the same intent.

We find it apparent, not only from this, but from a study of the statute as a whole, that its draftsmanship leaves something to be desired, in part, perhaps, because of the scope of the problems. We affirm the district court, but we think the proper interpretation of the statute lies somewhere between an absolute, literal, application of its language and the unlimited meaning adopted by the Fourth Circuit.

The *Gwaltney* court found the key statutory language —"is . . . in violation"—ambiguous, and hence encompassing all past, as well as present, violations. The court reasoned that one "continues to be 'in violation' by having 'violated.' . . . [T]he taint of a past violation is continuing." 791 F.2d at 309 (quoting *Student Public Interest Research Group* v. *Monsanto Co.*, 600 F. Supp. 1474, 1476 (D.N.J. 1985)). For this it analogized the case of a taxpayer who underpaid one year, but did not the next, pointing out that, until he paid, he continued to be "in violation." We find the argument forced, and the analogy inapt. In the case of the taxpayer, the violation was the non-payment, and it, of course, continued until the obligation was met. A ceased improper discharge does not "continue." Moreover, the "violation" defined by the statute is not the non-payment of the penalty.

Nor does the statute speak in terms of "taint." This might be arguable if it had read "is a violator," but "is

. . . in violation" speaks in terms of activity. The clear import of section 505(a) is that citizens are empowered to seek injunctive relief against a polluter that "is in violation" of the Act, and that in connection with such an action the district court is authorized to award "any appropriate" civil penalties. With great respect to the Fourth Circuit, we find its conclusion of ambiguity unpersuasive, particularly when it would have been so easy for Congress to have said "has violated," instead of "is . . . in violation" if the former was its intention, and with the difference being so conspicuous.

We note, too, that "effluent standard or limitation," ante, is defined in section 505(f)(6) as a "permit or condition thereof issued under section 402 of this Act, which *is* in effect under this Act . . . ." (emphasis added), a clear use of the present. It is true that under section 505(f)(1)'s definition of "effluent standard or limitation" the incorporation of other sections by reference produces grammatical confusion, but, in sum, in speaking of any "discharge" not otherwise excepted, there is no retreat from the present tense.

This use does not seem inconsistent, historically, with the enforcement emphasis of the anti-pollution acts. The Clean Air Act, from which the Clean Water Act took the phrase "is . . . in violation," *see* 42 U.S.C. § 7604(a), provided for injunctive relief only. Alertness of concerned citizens, *see* § 505(g), n.1, ante, was of moment, but of secondary importance; even when, in enacting the Clean Water Act, Congress added penalties, such were to go to the government. There was no change in purpose. Rather, House and Senate Reports on the Clean Water Act characterize the addition of civil penalties as simply a modification of the citizen's action for injunction authorized under the Clean Air Act.[2] Thus we cannot share

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[2] *See* S. Rep. No. 414, 92d Cong., 1st Sess. 79 (1971), *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3745:

the *Gwaltney* court's reliance upon the fact that if the words "is . . . in violation" require a showing of a violation at the time of suit, many past violations would be immune to citizens' suits. Some immunity was an originally contemplated circumstance; the court uncovered no unique lacunae. No amount of discovering ambiguity in the quoted words can escape the fact that, with respect to alleged violations of permits, § 505(f)(6), ante, no action can lie for past violations unless the "permit . . . is in effect." This consistently corresponds with the reference to violations in the present tense; past permit violations are relevant to the extent that they cast light on the propriety of an injunction, no longer appropriate if there is no longer a permit.[3]

> The Committee has established a provision in the bill that would provide citizen participation . . . modeled on the provision enacted in the Clean Air Amendments of 1970. As in that Act the provision in this bill is carefully restricted to actions where violations of standards and regulations or a failure on the part of officials to act are alleged. One modification would allow the Courts to impose civil penalties provided as a result of actions brought by citizens.

See also H.R. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972) ("Section 505 closely follows the concepts utilized in . . . the Clean Air Act. However, this legislation authorizes the courts to impose civil penalties, as well as injunctive relief."). Further support for this view may be found in congressional references to citizen suit provisions as a means of "abating" ongoing violations of the Act. *See*, e.g., S. Rep. No. 414 at 79-82, *reprinted in* 1972 U.S. Code Cong. & Admin. News at 3745-47.

[3] Plaintiffs and amici rely on the remarks of Senator Muskie, one of the Act's principal sponsors. Senator Muskie stated, in part, that "[c]itizen suits can be brought to enforce against both continuous and intermittent violations" and that

> [the] 60-day provision was not intended . . . to cut off the right of action a citizen may have to violations that took place 60 days earlier but which may not have been continuous. As in the original Senate bill, a citizen has a right under section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be, or to have been, in violation,

There is, however, a more serious problem if the concept of a present violation requires proof of its occurring at the instant of suit. A violation may last only ten minutes. Moreover, section 505(b)(1)(A) requires a sixty-day notice before suit is brought, so that even a persistent violator may, temporarily, "clean up his act." We therefore think that the words "is . . . in violation" should be sufficiently liberally construed to comport with the injunctive purpose of the Act—conduct indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one. We find this possible in the fact that the statutory phrase is not the three words we have heretofore considered, but is "is alleged to be in violation." It is far less of a stretch to interpret these words as applicable to a present continuing intent than to take the *Gwaltney* court's encompassing a single past act. We would give the full phrase the practical construction that is given to the $10,000 requirement for jurisdiction in a diversity case. There jurisdiction is not necessarily lost if, in the final analysis, a lesser sum is involved; a reasonably held allegation is sufficient. *See St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 288-89 (1938). We think the analogy excellent, and that the same construction is warranted, not only from the statutory wording, but also from its functional purpose. If a defendant's history of past violations is such that it is reasonable to believe that misconduct will continue, not only is it reasonable to allege a continuing

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whether the violation be a continuous one, or an occasional or sporadic one.

118 Cong. Rec. 33693, 33700 (1972). With due respect to Senator Muskie, we do not think an ambiguity is to be created out of whole cloth by his individual remarks. Moreover, the approach adopted in this opinion addresses what appears to be one of the Senator's principal apprehensions—that if only "continuous" violations are deemed to be covered under the Act, even persistent polluters may utilize the notice provisions to avoid liability.

violation, but this is precisely the showing that would induce a court to issue an injunction. *See*, e.g., *SEC* v. *Bonastia*, 614 F.2d 908, 912 (3d Cir. 1980). Such a construction corresponds both with the statutory language and with the statutory purpose.[4]

We accordingly hold that an action under 33 U.S.C. § 1365 may go forward if the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act. In reviewing actions under this standard, the district court should consider, among other things, the isolated or recurrent nature of the infraction, the degree of scienter on the part of the defendant, and the sincerity of its assurances against future violations. *Cf. Bonastia*, 614 F.2d at 912. We thus agree with the result in *Hamker* v. *Diamond Shamrock Chemical Corp.*, 756 F.2d 392 (5th Cir. 1985), in which the court held the plaintiff's allegation of a single, past violation to be insufficient. We do not, however, agree with the reasoning which, apparently, led the Louisiana district court, following the *Hamker* decision, to dismiss a number of actions simply because no violations occurred on the dates the complaints were filed. *See Sierra Club* v. *Copolymer Rubber & Chemical Corp.*, 621 F. Supp. 1013, 1015 (M.D. La. 1985). A plaintiff who makes allegations warranting injunctive relief in good faith, judged objectively, may recover a penalty judgment for past violations even if the injunction proves unobtainable.

In the case at bar, plaintiffs alleged violations of a permit that limited defendant's discharges of process wastewater. At the time plaintiffs brought suit, however, the defendant had ceased operating under this permit because of its completion of a tie-in arrangement with a municipal treatment facility. Under these circumstances,

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[4] The *Gwaltney* court recognized this possible construction, but, without comment, chose not to adopt it. *See* 791 F.2d at 308 n.9.

there was no reasonable likelihood that defendant's alleged infractions would continue, and the district court correctly determined that the action should be dismissed.

Finally, there was no abuse of the court's discretion in denying plaintiffs' August 1985 motion to amend their complaint (a second time) to add a Clean Water Act claim after the court had ordered dismissal. The new incidents had been disclosed to plaintiffs long before they had filed their motion. Furthermore, they apparently concerned matters not even within the scope of section 505(a). Plaintiffs had been given much consideration, and the court was well warranted in not reopening the case.

Affirmed.

Supreme Court, U.S.
FILED
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NO. 86-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,
and
NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 86-473

GWALTNEY OF SMITHFIELD, LTD., PETITIONER

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AND
NATURAL RESOURCES DEFENSE COUNCIL, INC.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE
RESPONDENTS IN OPPOSITION

We are filing this supplemental memorandum to advise the Court of a recent decision by the First Circuit addressing the issued raised by the petition in this case. Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., No.

86-1227 (Dec. 19, 1986). (In our brief in opposition (at 37-38 n.13), we noted the pendency of this case.) The First Circuit has adopted a "middle-of-the-road" approach to the question presented, holding that federal jurisdiction will not lie under Section 505 of the Clean Water Act for citizen suits for civil penalties in the case of "matters over and apparently done with" (slip op. 10), but that the district courts do have jurisdiction over suits seeking civil penalties based on good faith allegations of violations of the Act that, if not enjoined, are likely to continue. The court explained its reasoning as follows (slip op. 10-12):

> A violation may last only 10 minutes. Moreover, Section 505(b)(1)(A) requires a sixty-day notice before suit is brought, so that even a persistent violator may, temporarily, "clean up his

act." We therefore think that the words "is . . . in violation" should be sufficiently liberally construed to comport with the injunctive purpose of the Act -- conduct indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one. * * * We would give the full phrase the practical construction that is given to the $10,000 requirement for jurisdiction in a diversity case. There jurisdiction is not necessarily lost if, in the final analysis, a lesser sum is involved; a reasonably held allegation is sufficient. * * * We think the analogy excellent, and that the same construction is warranted [here].

We accordingly hold that an action under [Section 505] may go forward if the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act. In reviewing actions under this standard, the district court should consider, among other things, the isolated or recurrent nature of the infraction, the degree of scienter on the part of the

> defendant, and the sincerity of its assurances against future violations.

Insofar as the decision below may be read as sanctioning a citizen suit for civil penalties for a single, past violation, no matter how isolated and old, the First Circuit thus disagreed. At the same time, however, the First Circuit refused to endorse the approach of those district courts that have held, as advocated by petitioner, that Section 505 requires the plaintiff to establish the existence of a violation that was ongoing on the date the complaint was filed. Pawtuxet Cove Marina, slip op. 6, 12.

As we explained in our brief in opposition (at 38-40), petitioner has failed to show that the court of appeals' judgment would be any different even if

one were to adopt an alternative legal rationale. That is precisely what the First Circuit did in Pawtuxet Cove Marina, and is clear that the instant action would readily satisfy the requirements for federal jurisdiction set forth by the First Circuit. There is no question in this case that respondents' complaint contained good faith allegations of continuing violations; the fact that those violations ceased immediately prior to the filing of the complaint would not, under the First Circuit's analysis, defeat federal jurisdiction. Rather, the focus would be on the recurring nature of petitioner's violations and respondents' total inability to know that petitioner had suddenly brought itself into compliance with the Act.

Because petitioner has failed to demonstrate that its theory of jurisdiction has been accepted by any circuit on facts comparable to the facts of this case (see Br. in Opp. 31-40), we again respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted.

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October Term, 1986

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ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE, CONNECTICUT BUSINESS AND INDUSTRY ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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November 22, 1986

MOTION OF CONNECTICUT BUSINESS AND INDUSTRY ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to Rule 36.1 of the Rules of the Supreme Court, the Connecticut Business and Industry Association ("CBIA") moves the Court for leave to file its brief amicus curiae (bound with this motion) in support of the petition for certiorari.

CBIA is an organization of firms which operate in the State of Connecticut. CBIA presents the opinions of its members on environmental policy and other public issues to government agencies and legislators. It has sponsored meetings between member firms and government agencies to encourage compliance with the environmental laws by fostering cooperation between business and government.

However, under the rule adopted by the

court below and by the District Court for the District of Connecticut in Connecticut Fund for the Environment and Natural Resources Defense Council v. The Job Plating Co., Inc., 623 F.Supp. 207 (1985), members of CBIA that have cooperated fully with the government and are complying with the Clean Water Act are still subject to multimillion dollar penalties for past violations in suits brought by private parties.

Members of CBIA frequently have been targets of citizen suits brought under the Clean Water Act. Of 47 citizen Notices of Intent filed in Connecticut, approximately 42 were filed against members of CBIA or their subsidiaries. Of 32 citizen suits known to have been filed in Connecticut, all but one were filed against past or present members of CBIA. These members have paid over a million dollars in settlements, much of which has been paid

as environmental contributions in lieu of civil penalties for past violations of the Act. Other suits are pending. Respondent Natural Resources Defense Council has been a plaintiff in all the citizen suits brought against members of CBIA.

CBIA has requested the consent of the parties to the filing of its amicus brief in support of the petition for certiorari. The Petitioner, Gwaltney of Smithfield, Ltd., has consented, as evidenced by the letter from its counsel, Hogan & Hartson, attached to the filing letter enclosed herewith. The Natural Resources Defense Council has declined to give its consent. The Chesapeake Bay Foundation, Inc., has failed to respond to CBIA's request for consent.

Amicus believes that it will present arguments in favor of granting certiorari which will not be presented by the parties to this action or by other amici. CBIA

offers a broader perspective gained from an ongoing study of citizen suits under the Clean Water Act, 33 U.S.C. Sec. 1365.

This study has shown that in the last four years there has been a sudden flood of such suits across the country. Over five hundred notices of intent to file such suits have been issued in at least 38 states and all ten of EPA's regions. The lower courts are divided and in need of guidance on whether to accept the recently advanced theory that defendants who are in full compliance with the Act are still liable for multimillion dollar civil penalties for past violations.

Research also shows that most of this sudden increase in litigation is the work of a small number of organizations. The threat of large civil penalties for indisputable past violations is frequently used to influence defendants to accept settlements which include payments to the

plaintiff, or to a related organization or project, together with attorneys' fees. This incentive to sue for private gain conflicts with the expressed intent of Congress. It also frustrates efforts to foster compliance with the law. Permittees, such as the members of CBIA, who have cooperated fully with official regulations may nonetheless face conflicting demands from freelance "regulators".

This broader perspective on the issues is peculiarly within CBIA's understanding, both from its direct experience with its members in Connecticut, and from its investigation into the nationwide scope of the current citizen suits practice. For the foregoing reasons, CBIA prays that

this Court grant its motion for leave to file the accompanying brief amicus curiae.

By its Attorneys,

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QUESTION PRESENTED

Whether the citizen suits provision of the Clean Water Act, 33 U.S.C. §1365, authorizes citizens to bring suit for civil penalties for past violations against defendants who are currently in full compliance with the Act?

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Connecticut Business and Industry Association ("CBIA") is the largest business organization in the State of Connecticut, having 6300 members who employ a total workforce of over 700,000 employees. CBIA presents the views of its members on public policy and legal issues to legislative and judicial authorities.

CBIA and its members have been directly involved in the issue that is before the Court. Of the 47 Citizen Notices of Intent filed in Connecticut since 1983, approximately 42 have named CBIA members as defendants.

The interest of CBIA is more fully set forth in its Motion for Leave to File Brief as Amicus Curiae, above.

INTRODUCTION AND STATEMENT OF THE CASE

The amicus, Connecticut Business and Industry Association, adopts and incorporates by reference the Statement of the Case of Gwaltney of Smithfield, Ltd., in its Petition for Certiorari.

The amicus also submits, however, that a broader perspective on the issues herein is both relevant and important to this Court's consideration of the Petition. This case presents a question of statutory interpretation which will not only determine the interests of the parties immediately before the Court, but will also provide guidance to the many lower courts which are confronting a rising flood of such litigation nationwide.

The citizen suits provision of the Clean Water Act, which was enacted in 1972, was used only infrequently during the first decade of its existence. During

the four years from 1978 through 1981, for example, an average of fewer than five such suits per year were filed.[1]

Since late in 1982, however, there has been a dramatic increase in citizen suits under the Clean Water Act. The increase appears to have been at least accompanied, if not in large part fueled, by the theory that such suits are available not merely for abatement actions for ongoing violations, but for civil penalty claims for past violations.

Beginning in late 1982, the United States Environmental Protection Agency has kept a log of all citizen notices of intent to sue, required by §505 of the Act, 33 U.S.C. §1365, filed with its headquarters in Washington. In the

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1. Environmental Law Institute, Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes (1984) (hereinafter "ELI Study") at III-10,27,29.

four-year period from September of 1982 to August, 1986, at least 558 citizen suit notices have been filed with EPA.[2]

The statute does not require notice to EPA upon the subsequent filing of litigation, and the percentage of citizen suit notices which have resulted in suit is difficult to ascertain. Investigation has thus far disclosed that at least 135 of the notices have been followed by the filing of a federal court Complaint, but the true figure is certainly higher. At least 298 of the 558 notices, or roughly 53 percent, have been filed by one of only six private organizations: the Natural

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2. This is a minimum figure, as the true numbers are likely in fact to be higher. Some notices are filed with EPA regional offices and do not appear in EPA's Washington files. Freedom of Information Act requests are pending with the remaining five EPA regions.

Resources Defense Council, the Atlantic States Legal Foundation, Connecticut Fund for the Environment, Friends of the Earth, Sierra Club, and the Student Public Interest Research Group of New Jersey.

The amicus offers these facts principally in support of three propositions. First, the issue involved in this matter is one only recently raised by plaintiffs, and is of increasingly widespread importance to an increasing number of lower courts. The sheer number of cases brought, together with the vast potential for future cases not only under the Clean Water Act,[3] but also under the corresponding provisions of other federal

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3. As of January, 1984, roughly 65,000 permits had been issued under the Clean Water Act. Petition for Certiorari of Gwaltney of Smithfield, Ltd. (hereinafter "Petition") p. 23.

environmental statutes,[4] indicate the importance of the need for guidance to the lower courts on the availability of jurisdiction for such suits when past violations are claimed.

Second, the use of citizen suits for civil penalties for past violations, and the plaintiffs' common tactic of settlement, raise questions concerning the incentive to such litigation. Congress made clear its intent to enact a provision

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4. Provisions for citizen suits for civil penalties against any person "who is alleged to be in violation" of the law exist in the Resource Conservation and Recovery Act, (RCRA) 42 U.S.C. §6972 (1984) (penalties of up to $25,000 per day of violation); and in the Superfund Amendments and Reauthorization Act of 1986, Pub.L. 99-499,§206, adding new §310 to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601 et seq. (penalties of up to $25,000 per day of violation for a first offense and up to $75,000 per day for subsequent offenses).

the use of which would be motivated solely by concerns of public health and welfare. Currently, however, the threat of steep civil penalties under the Act is frequently used to influence defendants to accept settlement demands which include a financial contribution either directly to the plaintiff organization, or to a related organization or an environmental project, together with costs and attorneys fees. The incentive to sue, particularly for litigating environmental organizations, has become less one of concern for the public health and welfare, and more one of private gain for the organization.

And finally, the plaintiffs' interpretation of the statute is improper for reasons of public policy. The increasing use of citizen suits in instances where the responsible environmental agency has specifically

chosen to ensure compliance by means other than the exercise of its civil penalty authority interferes with efforts to bring permittees into full and prompt compliance. Granting to citizen groups an enforcement power in important respects equal to, rather than supplementary of, the Administrator's inevitably leads to inconsistencies of application and significant disagreement with the regulation and enforcement methods and priorities of the responsible agencies.

For all of the above reasons, the amicus submits that this Court's grant of the requested writ is both necessary and appropriate to clarify a question of law which is of increasing importance to the lower courts.

SUMMARY OF ARGUMENT

The decision of the Fourth Circuit Court of Appeals below directly conflicts with decisions of this Court and of the Fifth and Seventh Circuits, which have clearly stated that the citizen suits provision of the Clean Water Act provides jurisdiction only for current or ongoing violations.

The District Court lacked subject matter jurisdiction over this suit because the Clean Water Act was not being violated at the time suit was filed. The statutory language and the legislative history establish Congress's intent that citizen suits be available for the purpose of abatement of ongoing violations, and not for claims for civil penalties for past violations.

The lower courts are divided and need guidance on what is becoming a common variety of suit. The extent of citizen

suit litigation has increased substantially over the past several years.

Congress intended to enact a citizen suits provision which would be used purely for the purpose of protecting the public health and welfare. As the provision is currently being used, however, it provides a private incentive to suit which conflicts with the intent of Congress.

ARGUMENT

I. THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS, AND WITH A DECISION OF THIS COURT, AND MIS-READS THE STATUTORY LANGUAGE.

A. The Ruling of the Fourth Circuit Below Squarely Conflicts With the Rule in the Fifth and Seventh Circuits, and With This Court's Opinion in Middlesex County.

The Clean Water Act provides for federal jurisdiction over citizen suits against a private party only if that party

"is alleged to be in violation" of an effluent standard or limitation. 33 U.S.C. §1365(a)(1). This jurisdictional requirement is clearly stated in the present tense, and does not grant jurisdiction over a party alleged to have violated a standard at some time in the past.

The Fifth Circuit Court of Appeals, with reference also to decisions of the Seventh Circuit and of this Court, has provided the clearest ruling on the issue, in Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392, 395 (1985):

> By its ordinary meaning, the language of §1365 requires an allegation of an ongoing violation . . . . Hamker asserts that "to be in violation of" means "to have violated"; however this interpretation obviously strains the grammar of the statute and diverges from its ordinary meaning. "[Section 1365] does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past. . . ." City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008, 1014 (7th Cir. 1979), cert. den., 444 U.S.

1025 (1980) (cited with approval in Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1, [18, n.28] (1981).

The Court below expressly disagreed with Hamker, finding that the language of the statute can be read "to comprehend unlawful conduct that occurred only prior to the filing of a lawsuit." Petition for Writ of Certioriari (hereinafter "Petition") at 8a. Relying, as to the central issue, exclusively on district court precedents, the Fourth Circuit held that "citizen suits ..., seeking civil penalties for permit violations committed entirely in the past, are permitted under §505(a)." Id. at 17a.

A clearer statement more squarely in conflict with Hamker could not be devised. In Hamker the Fifth Circuit plainly held that "prospective relief is the only kind of relief authorized by the Act's citizen suit provision, and that civil penalties

are available 'only as prospective relief.'" Id. at 15a, citing Hamker, 756 F.2d at 398-99. The Court below conceded the direct conflict between its reading of the statute and that of Hamker. While suggesting that "it could be argued that Hamker is distinguishable on its facts," the Court declared that even if it is not distinguishable, "we decline to follow it to the extent that it holds that §505(a) of the Clean Water Act does not permit citizen suits seeking civil penalties for past violations." Petition at 15a.

The Court also acknowledged contrary language by the Seventh Circuit in City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980), and by this Court in Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981). According to the Court below, any statements in

Middlesex County "limiting the scope of citizen suits to prospective relief were mere dicta," while the Seventh Circuit's comments in City of Evansville regarding the unavailability of civil penalties for past violations were "wholly unnecessary to its decision." Petition at 16a, and n. 14, citing City of Evansville, 604 F.2d at 1014; Illinois v. Outboard Marine Corp., 619 F.2d 623, 631 (7th Cir. 1980), vacated and remanded, 453 U.S. 917 (1981), on remand, 680 F.2d 473 (7th Cir. 1982); and Pawtuxet Cove Marina v. Ciba-Geigy Corp., 21 Env't Rep. Cas. (BNA) 1390, 1393 (D.R.I. 1984).

The Fourth Circuit may not, however, so easily dismiss as inapposite statements of statutory interpretation which are central to the holdings of City of Evansville and of Middlesex County. Both cases presented claims for damages pursuant to an implied private right of

action under the Clean Water Act, and the analysis necessarily demanded an examination of the nature and adequacy of the remedies which the Act expressly does provide.

It was in this context that the Seventh Circuit and this Court made clear reference to the limited nature of the citizen's right of action explicitly contained in the statute, and did so in terms plainly inconsistent with the theory of the instant case. The citizen suits provision "allows suits under the Act by private citizens, but authorizes only prospective relief," 453 U.S. at 6 (emphasis supplied); and permits private citizens "to sue for injunctions to enforce" the statute. Id. at 14. The structure of the Act and its legislative history underscore "the limited nature of the citizen suits being authorized." Id. at 17, n. 27. And according to the

Seventh Circuit:

> [The citizen suits provision] authorizes a civil action against a party "alleged to be in violation" of effluent standards or limitations under the Act.... It does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past or for recovery of damages.

City of Evansville, 604 F.2d at 1014 (emphasis supplied).

The district courts are similarly divided. District Courts in Louisiana, Sierra Club v. Copolymer Rubber & Chemical Corp., 621 F.2d 1013 (M.D. La. 1985), app. pending, No. 85-3763 (5th Cir.), Sierra Club v. Monochem, No. 84147B (M.D. La. 1985) app. pending, No. 85-3762 (5th Cir.); and Rhode Island, Pawtuxet Cove Marina, Inc., v. Ciba-Geigy Corp., 21 Env't Rep. Cas. (BNA) 1390, 1393 (1984), 22 Env't Rep. Cas. (BNA) 1999 (1985), have ruled that there is no jurisdiction over such suits. Courts in New Jersey, e.g. Student Public Interest Research Group v.

Monsanto Co., 600 F.Supp. 1474 (1985); Massachusetts, Sierra Club and Natural Resources Defense Council v. Raytheon, 22 Env't Rep. Cas. (BNA) 1050 (1984); Connecticut, Connecticut Fund for the Environment and Natural Resources Defense Council v. The Job Plating Co., Inc., 623 F.Supp. 207 (1985); New York, Sierra Club v. Hanna Furnace Corp., 636 F.Supp. 527 (W.D.N.Y. 1985), Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F.Supp. 284 (N.D.N.Y., 1986); Pennsylvania, Fishel v. Westinghouse Electric Corp., 640 F.Supp. 442 (M.D.Pa. 1985), and Virginia, in the instant suit, have reached the opposite conclusion.

B. The Legislative History Establishes Congress's Intent to Limit Citizen Suits to Abatement of Current Violations.

Congress intended in the Clean Water Act to write a statute whose meaning would be clear on its face. "[W]e have tried in

this legislation not to leave the final evaluation of the bill to legislative history, but instead to write into law as clearly as possible the intent of the Congress." Remarks of Sen. Muskie during Senate debate, A Legislative History of the Water Pollution Control Amendments of 1972 ("Leg. Hist."), Vol 1 at 163-164 (1973).

Where the language of a statute is plain on its face, the courts are constrained to apply that language, and not to re-fashion the wording according to its own perception of how Congress must have meant the provision to be phrased. Consumer Products Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980).

Resort to the legislative history for interpretive guidance, however, further underscores that Congress intended to authorize citizen suits only to "abate" ongoing violations of the Act. See S.

Rep. 414, 92d Cong., 1st Sess. at 79-81, reprinted in 1972 U.S. Code Cong. & Ad. News, vol. 2 at 3745 ("USCCAN") and in 2 Leg Hist. at 1482, 1497. "Abate" means "to put an end to." Webster's New World Dictionary, p. 2 (1976). Other comments in the legislative history support this interpretation. The purpose of the citizen suits provision was described as permitting citizens to "seek compliance . . . with the Act," Water Pollution Control Legislation, Hearings Before the Subcommittee on Air and Water Pollution of the Committee on Public Works, United States Senate, 92d Congress, 1st Sess., Serial No. 92-H9 at 109; "to abate a violation," id. at 114; and to sue "for the purpose of abating pollution," Id. at 707 (comment of Sen. Eagleton). "[A] citizen can obtain an injunction but cannot obtain money damages for himself." 1 Leg. Hist. at 220-21 (comment of Sen.

Bayh).

Congress expressed concern that the citizen suits provision be restricted to abatement rather than be a source of funds for private persons and groups. 1 Leg. Hist. at 674. The Fifth Circuit pointed out in Hamker that permitting citizen suits for past violations would defeat this Congressional intent:

> If §1365 were interpreted as permitting citizen suits for civil penalties for past violations, all state damage claims which could be brought under pendent jurisdiction could be litigated in a federal forum, thus undermining congressional intent to limit the burden on the district courts. Since the Act provides for awards of attorney's fees and expenses, there would be a substantial incentive to bring suit under the Act rather than in state court.

756 F.2d at 396.

The citizen suits provision of the Clean Air Act of 1970, which provided for citizen suits for the first time, and which formed the model for the Water Act version, was the subject of extensive

debate over fears that it would clog an already congested federal court system. R. Schwartz & D. P. Hackett, Citizen Suits Against Private Industry Under the Clean Water Act, 17 Natural Resources Lawyer 327 (1984) (herinafter Schwartz & Hackett) at 328. Concern was expressed over the possibility of frivolous, harassing or duplicative suits and conflicts between EPA policy and citizens' strategy. Id. at 328-29. In response Senator Hart argued that the inability of plaintiffs to collect damages would limit the number of suits filed. Id.

The addition in the Clean Water Act of a provision empowering the Courts to assess "any appropriate civil penalties" was not discussed in the legislative history, Schwartz & Hackett at 331, except to specify that any such penalties be paid into the federal Treasury. Congress considered and specifically rejected the

option of allowing citizens to collect part of the penalties. 1 Leg. Hist. at 220-21 (comment of Sen. Bayh). The Senate Committee Report on the Amendments stated, "It should be noted that any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant." Report of the Senate Public Works Comm. at 79, reprinted in 2 Leg. Hist. at 1497.

This Court has recognized, as has the Fifth Circuit in Hamker, that "one of the primary congressional purposes behind limiting citizen suits was to preclude the possibility that §1365 suits would place an undue burden on the federal courts." Hamker, 756 F.2d at 396.

> [T]he legislative history of the [Clean Air] Act contains explicit indications that private enforcement suits were intended to be limited to the injunctive relief expressly provided for. Senator Hart, for example, stated:
> "It has been argued, however, that conferring additional rights on the

> citizen may burden the courts unduly. I would argue that the citizen suit provision of §1358 has been carefully drafted to prevent this consequence from arising. First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. It will be the rare, rather than the ordinary, person, I suspect, who, with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill." 116 Cong. Rec. 33104 (1970).

Middlesex, 453 U.S. at 17, n. 27 (emphasis supplied). It was this measure, incorporated in the Clean Water Act, which Senator Muskie recognized as a "restrictive" citizen suits provision. Scwartz & Hackett, at 330. See also, Hamker, 756 F.2d at 396 (availability of citizen suit for civil penalties for past violations, because Act allows for attorneys' fee awards and expenses, would undermine congressional intent to limit actions to those brought solely to protect

health and welfare.)

The present use of the citizen suits provision for civil penalty claims for past violations directly conflicts with this expression of Congressional intent.

II. THE LOWER COURTS ARE FACED WITH AN INCREASING NUMBER OF SUCH CITIZEN SUITS, AND ARE IN NEED OF GUIDANCE FROM THIS COURT.

A. The Extent of Citizen Suit Litigation Has Increased Dramatically Over the Past Four Years.

This Court's jurisdiction is appropriate in this matter also to provide guidance to the increasing numbers of district courts which are required to confront the issue. Litigation under the citizen suits provision of the Clean Water Act has become, since late in 1982, increasingly common, and similar private rights of action exist under both RCRA and CERCLA as recently amended.

From its enactment in 1972 until late in 1982, the citizen suits provision of the Clean Water Act was rarely used. During the four years from 1978 through 1981, for example, an average of fewer than five per year were filed nationwide. ELI Study III-10, 27, 29.

Beginning in late 1982 with the filing of a group of 14 by one law office, the numbers of such suits have increased dramatically. Although EPA's records are apparently not complete, they do reveal that in the four years since that time at least 558 notices have been filed. See Chart, Appendix A, attached hereto. What percentage of these notices have subsequently been followed by litigation is not yet fully known, but it is known that at least 135 have resulted in federal court Complaints. If Connecticut is any guide the numbers are likely to be even higher. Of 47 notices of intent filed in

Connecticut from 1983 to date, 32 (68%) are known to have led to federal court litigation.[5]

The citizen suit notices have been well distributed geographically, with each of the ten EPA Regions and at least 38 states and the District of Columbia represented. The principal activity has been in Pennsylvania (90 notices), New York (73), Connecticut (47), New Jersey (36), Louisiana (34), Massachusetts (33), Texas (31), California (24), and Ohio (22).

The identity of the plaintiff groups responsible for the upsurge of notices is

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5. By another account, of the 108 citizen suit notices filed in 1983 alone, 62 led to federal court suits, which together requested approximately $100 million in penalties. Lewis, "Environmentalists' Authority to Sue Industry for Civil Penalties Is Unconstitutional Under the Separation of Power Doctrine," 16 Envir. Law Rep. 10101, 10102 (1986).

not nearly so diverse. Most of the citizen suit notices known to have been filed since September of 1982 -- 298 of the 558 notices, or 53% -- have been filed by or on behalf of only six organizations: Natural Resources Defense Council, Sierra Club, Friends of the Earth, Atlantic States Legal Foundation, Connecticut Fund for the Environment, and New Jersey Public Interest Research Group. All six are either parties or amici in the instant case. They often join in filing notices and filing suit.[6]

There is, of course, nothing per se improper in the fact that so large a share

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6. The Natural Resources Defense Council has filed 106 notices; Sierra Club has filed 121; Friends of the Earth, 37; Atlantic States Legal Foundation, 56; Connecticut Fund for the Environment, 42; and New Jersey Public Interest Research Group, 38. These figures total more than 298 because of the frequent joint filings.

of this litigation and threatened litigation is carried on by so limited a cast of plaintiffs. But the extent of the plaintiffs' practice in this area, and the pattern which it follows, combine to lend weight to the argument that this use of the citizen suits provision, which appears to be fueled in large part by the theory that such suits are available for past violations, is a far cry from what Congress ever intended.[7]

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7. The time lag involved in the preparation and filing of the Discharge Monitoring Reports on which the notices are based, and the incompleteness of the information the amicus has yet received, combine to make it all but impossible at this point to say what portion of the citizen suits notices or complaints filed relate, as in the instant case, to purely past violations. It is known that more than 20 such claims have thus far reached the stage of reported decisions, Petition at 22, n.15, so the numbers of those brought and unreported, settled, or still pending is likely to be considerably higher. What is

B. The Plaintiffs' Pattern of Use of Citizen Suits Conflicts With the Congressional Intent In Enacting The Provision.

Far from displaying a motivation solely to protect the public health and welfare, the current pattern and practice of those groups responsible for the upsurge in Clean Water Act citizen suit filings instead appears to demonstrate

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[Footnote Continued]

plainly apparent from a review of the EPA files, however, is that virtually every notice contains claims for civil penalties for past violations, whether the defendant is presently in compliance or not. It is, therefore, in a very real sense that the recent increase in citizen suits is fueled by the availability of civil penalties for past violations.

that the primary motivating factors in such actions, particularly as to past violations, are that the threat of steep civil penalties may serve as a spur to settlement, and that attorneys fees are available to fund the effort.

Holders of NPDES permits under the Act are required to monitor their own effluent discharges, and to file monthly Discharge Monitoring Reports. 33 U.S.C. §1318(a)(3)(A); 40 C.F.R. §122.41(1)(4). These DMRs are public records, and it is a simple matter for a potential plaintiff organization to review them, compare the numerical reports with the permit limits, and establish technical violations of the Act. ELI Study at I-7, V-2, V-12. Courts have generally ruled that the DMRs constitute admissions, and some have held that they provide conclusive evidence of violation of the statute's strict

liability standard.[8]

Under a rule of law that permits civil penalty suits for violations which occurred as long as five years prior to the date of suit,[9] a permittee whose DMRs display even the slightest violation over the previous five years is likely to be

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8. Locust Lane v. Swatara Township Authority, 636 F.Supp. 534 (M.D. Pa. 1986); Student Public Interest Research Group of New Jersey v. Jersey Central Power Co., 642 F.Supp. 103 (D.N.J. 1986).

9. While occasional courts have held there to be no statute of limitations for such actions, and have therefore permitted plaintiffs to go back indefinitely, Student Public Interest Research Group of New Jersey v. Tennaco Polymers, 602 F.Supp. 1394 (D.N.J. 1985), Fishel v. Westinghouse Electric Corp., 640 F.Supp. 442 (M.D. Pa. 1985), the more usual rule is to imply the general federal penalty statute of limitations of five years. 28 U.S.C. §2462. Friends of the Earth v. Facet Enterprises, 618 F.Supp. 532 (W.D.N.Y. 1984); Chesapeake Bay Foundation and Natural Resources

disposed to settlement[10]. The statute sets a civil penalty of "$10,000 per day of such violation," 33 U.S.C. §1319(d), and some courts, including the Court below

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[Footnote Continued]
Defense Council v. Bethlehem Steel Corp., 22 Env't Rep. Cas. 1894 (D.Md. 1985); Conn. Fund for the Environment and Natural Resources Defense Council v. Job Plating Co., Inc., 623 F.Supp. 207 (D.Conn 1985); Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F.Supp. 284 (N.D.N.Y. 1986).

10. The plaintiff organizations may profess to some degree of reasonable judgment in choosing to pursue only those violations which have reached a certain level of significance, but two points in response are worthy of note. First, whatever the enforcement priorities set by the plaintiff organizations, they are bound to differ from those of EPA and the state environmental agencies which by statute are given the responsibility to make such priority judgments. And second, the rule of law which enables these plaintiff organizations to pursue their litigation and settlement campaign is one which will apply

in the instant matter, have interpreted that provision to permit an assessment of up to $300,000 for violation of a single monthly average limitation. Petition at 18a - 22a. Given the severity of the potential penalty, plus attorneys' fees to the plaintiff and the defense costs of litigating the matter, and given the unavailability of other than equitable defenses, a defendant is faced with little choice but to settle.

The settlement terms proferred by the plaintiff organizations provide further

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[Footnote Continued]
to all plaintiffs, including those less responsible in their judgments. A citizen suit for even a single minor and technical violation of the Act five years prior to the filing of a Complaint will be made possible by the plaintiffs' statutory reading. Since a DMR admits liability, and since the statute provides a strict liability standard, $10,000 potential penalty, and attorneys fees in any event, there is little if any incentive not to sue for even the most trivial violation.

demonstration that the current tactic diverges significantly from Congress's intended result. Civil penalties assessed under the Act were meant for deposit in the Treasury. Report of the Senate Public Works Comm. at p. 79, reprinted in 2 Leg. Hist. at 1497, but the settlements which plaintiffs demand often require various environmental contributions in lieu of penalties.

> As a starting point, the environmental groups frequently inform target companies that their settlement goals include entry of a consent decree containing the following provisions:
> 1. civil penalties or alternatively, a contribution of a comparable amount to an environmental project located in the same state,. . . . .
> 4. reimbursement for the plaintiffs' attorney's fees and litigation costs.

Schwartz & Hackett at 328 (1984). See also, J. Miller, Private Enforcement of Federal Pollution Control Laws Part III, 14 Env'l L. Rep.(Env't L. Inst.) 10407, 10426 (1984) Consent decrees in citizen

suits brought by environmental groups have typically included payments of $20,000 to $400,000 to environmental organizations in lieu of civil penalties to the U.S. Treasury.[11] The agreements sometimes provide for a schedule of penalties to be paid to environmental groups in the event that the defendant violates the consent decree; these penalties may amount to far more than the

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11. E.g., Sierra Club v. Keystone Automotive Plating Co., No. HM 84-4020, (D.Md., May 30, 1986) ($400,000 to the Nature Conservancy); Student Public Interest Research Group of New Jersey v. Ragen Precision Industries, No. 83-1604 (D.N.J. Nov. 16, 1985) ($100,000 to the Passaic River Coalition); Sierra Club v. Aluminum Company of America, 585 F.Supp. 842 (N.D.N.Y. 1984) (consent decree Oct. 5, 1984) ($87,400 to the Adirondack Historical Association for environmental education projects and conservation).

initial "contribution".[12] In some instances, the plaintiffs have themselves been the beneficiaries of these payments.[13] Typically, these sums are described as "contributions" to tax-exempt organizations.[14]

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12. E.g., Connecticut Fund for the Environment and Natural Resources Defense Council v. Bridgeport Brass Company, No. H-84-955 (D.Conn. Oct. 23, 1984) ($30,000 to the Open Space Institute, an organization with the same address as the NRDC, plus up to $86,000 more in noncompliance penalties payable to the same organization).

13. E.g., Sierra Club and Natural Resources Defense Council v. Interpace Corp., No. 83-0127C, (W.D.N.Y., Feb. 14, 1983) ($25,000 for environmental projects selected by plaintiffs); Sierra Club v. Philips ECG, No. 83-52T (W.D.N.Y. Jan. 25, 1983) ($15,000 to be used by Sierra Club for projects of its choice relating to Seneca River).

14. E.g., Connecticut Fund for the Environment and Natural Resources Defense Council v. Pfizer Inc., No. H 85-86 (D.Conn. Jan. 30, 1985) (at least $25,000 to "The Open Space Institute, a 501C(3) tax exempt charitable organization").

The United States has protested that payments to private groups in lieu of civil penalties are improper and may be illegal,[15] but such agreements have nonetheless been approved by the district courts.

In addition to contributions in lieu of penalties, the consent agreements usually provide for substantial attorneys fees and other litigation charges to be paid to the plaintiff organizations. Such fees sometimes exceed the amount of the

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15. In its amicus brief in the court below, the United States argued that "all civil penalties assessed in this action must be deposited with the United States Treasury." Brief at n. 18. In its amicus brief on the constitutionality of the citizen suits provision in Student Public Interest Research Group of New Jersey v. Monsanto, 600 F.Supp. 1474 (D.N.J. 1984), the United States went so far as to argue that an environmental plaintiff which settled a citizen suit for a payment to itself could be

penalty or "contribution."[16]

A comprehensive picture of the pattern of citizen suits on a nationwide basis is difficult to provide. But a view of those notices filed in Connecticut is at least instructive, and may be representative of the nationwide practice.

[Footnote Continued]
considered in violation of the Miscellaneous Fees Act, 31 U.S.C. §3302(c), which requires "[a] person having custody or possession of public money" to deposit it in the Treasury. Brief, n. 31.

16. E.g., Student Public Interest Research Group of New Jersey and Natural Resources Defense Council v. J.T. Baker Chemical Co., No. 83-685, (D.N.J., Jan. 19, 1984) ($10,000 civil penalty payable to U.S. Treasury and $29,000 in attorneys' fees and other costs payable to plaintiffs); Hudson River Sloop Clearwater, Inc., and Natural Resources Defense Council v. White Mop Wringer Co., No. 82-CV-1306 (N.D.N.Y., June 12, 1984) ($15,000 to Open Space Institute and up to $23,000 attorneys fees and other litigation expenses).

The sudden upsurge of citizen suit activity in Connecticut began in September, 1983, with the filing of 21 Notices of Intent. The Notices were filed jointly by the Connecticut Fund for the Environment and the Natural Resources Defense Council, and, except for the recitation of the particulars of the discharges, locations, and dates which allegedly violated the Act, the format and language of each Notice is identical.

From 1983 through the present date, 47 Notices are known to have been filed in Connecticut, 42 of which have been filed by CFE and NRDC. Of those 42 Notices filed, two have gone to judgment on the merits,[17] and three are still pending.

---

17. CFE and NRDC v. Job Plating Co., 623 F.Supp. 207 (1985), Motion for Summary Judgment decided in favor of plaintiffs on Sept. 27, 1985, on basis that jurisdiction is available for civil penalties for purely past violations,

The remaining 37 have been settled, 10 prior to the filing of a Complaint and the other 27 after suit had been instituted.

According to a recent newspaper accounting, the settlements of the 28 litigation cases in Connecticut have netted at least $916,500 in environmental contributions in lieu of penalties, and an additional $484,250 in attorneys fees to the plaintiff organizations. D.P. Jones, "Activists Pressure Polluters", Hartford Courant, October 6, 1986, p. 1, quoting counsel for CFE. Figures for the 10 matters settled prior to suit are not known.

[Footnote Continued]
settled for $77,500 after Court referred parties to Gwaltney lower court ruling for plaintiffs; CFE and NRDC v. Contract Plating Co., 631 F.Supp. 1291 (1986), citizen suit barred by State's diligent prosecution of prior suit.

These figures are presented not in dispute of their appropriateness as to any given case or fact pattern -- at least with regard to any civil penalties in the nature of prospective relief -- but only to offer some indication of the magnitude of the current use of the citizen suit strategy, and particularly by a small group of six organizations. The availability of environmental contributions, sometimes directly to the plaintiff organization itself, as well as substantial attorneys fees for what is a relatively simple assembly-line type of litigation, provides a significant incentive to bring such litigation. This Congress clearly did not intend in the citizen suits provision of the Clean Water Act.

One further point of pragmatism should perhaps be noted. The enforcement powers of the EPA and its delegated state

agencies granted by the Act include both injunctive relief and penalty provisions. The primary goal of the statute being to achieve full and prompt compliance, a regulatory authority may well choose to forego the imposition of a penalty as a means, whether informally by discussion or more formally by consent order, to persuade a more immediate or comprehensive corrective measure. This flexibility to determine the appropriate enforcement priorities is reflected in the EPA Enforcement Policy. EPA Civil Penalty Policy, Env't Rep. (BNA) (Fed Laws) 41:2991 (1984). That the use of citizen suits for civil penalties for purely past violations interferes with the setting of such enforcement priorities is apparent from the facts of the instant case.

Gwaltney undertook corrective measures to bring itself into full compliance, all with notice to and the approval of the

State Water Control Board, which then declined to press for penalties for past violations. Petition at 3-4. To allow private citizen groups to pick up the enforcement cudgel which the agency, in the exercise of its responsibility to achieve compliance, had chosen to let lie, is both impermissible under the Act and unwise public policy.

CONCLUSION

For the reasons stated above, the amicus respectfully submits that this Court should grant the petition for writ of certiorari in this case.

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APPENDIX A

CITIZEN SUIT NOTICES

Year	All Notices	Notices Filed By Major Environmental Groups*
1978	1	Unknown
1979	9	Unknown
1980	6	Unknown
1981	6	Unknown
1982	19	15
1983	110	72
1984	174	124
1985	138	42
1986**	118	45
TOTALS	558	298

* Natural Resources Defense Council, Atlantic States Legal Foundation, Connecticut Fund for the Environment, Friends of the Earth, Sierra Club, Student Public Interest Research Group of New Jersey.

** Partial results through approximately September, 1986.

NOV 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-473

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.
and
NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

BRIEF OF *AMICI CURIAE* MID-ATLANTIC LEGAL FOUNDATION, INC., AND CONSUMER ALERT IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

By adopting the citizen suit provisions of the federal Clean Water Act, did Congress intend to empower individual citizens to punish operators of economically and socially productive facilities who, by the exercise of good faith and the adoption of state-of-the-art technology, have accomplished compliance with the permit provisions of the Act?

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INTERESTS OF *AMICI*

Pursuant to the Court's Rule 42, Mid-Atlantic Legal Foundation, Inc. and Consumer Alert hereby move the

Court for leave to file the attached brief as *amici curiae*. Consent was secured from counsel for all parties. Copies of the letters of consent have been filed with the Court.

Mid-Atlantic Legal Foundation, Inc., is a non-profit, tax-exempt corporation organized and existing under the laws of Pennsylvania. It is a law firm which seeks to present balanced articulation of the public interest in matters of broad impact such as the instant case.

Consumer Alert is a non-profit corporation organized and existing under the laws of the District of Columbia. It is a nationwide organization composed of over 6,000 members of whom approximately 160 are residents of Virginia. Consumer Alert engages in the study and dissemination of information on problems and issues affecting American consumers. Its principal objective is to ensure fair and fully expositive presentations of matters affecting the public interest.

STATEMENT OF THE CASE

For the sake of brevity *amici* do not separately set forth their statement of the case but adopt that set forth by petitioner in its petition.

Amici do set forth certain key facts and the issues presented by those facts to the courts below and here.

(a) *Key Facts:*

October 27, 1981	Petitioner acquires existing operating facility and shortly thereafter learns of permit exceedences.
October 1982	Interrelated chlorine/fecal coloform problem solved.
October 1983	State-of-the-art waste water treatment facility in place and debugging.

March 1983	Enforcement agency affirmatively approves technology and solutions and affirmativley rejects enforcement action as unnecessary.
May 15, 1984	Last nitrogen exceedence recorded.
June 15, 1984	Citizen suit commenced.

From May 15, 1984 to the present, a period of two and one-half years, no exceedences have occured, save one attributable to an act of God.

(b) *The Issue*

The issue as perceived and defined by conflicting courts below has been whether a continuing violation is necessary to confer subject matter jurisdiction over citizen suits seeking penalties for wholly past violations. The Fifth Circuit has answered yes [*Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985)]. The Fourth Circuit in the instant case has answered no.

Amici suggest that the issue should be defined differently: Did Congress intend to confer subject matter jurisdiction over suits by individual citizens which seek penalties for wholly past violations which occurred in a period during which the operator

1. acted in good faith,

2. with reasonable diligence,

3. solved permit problems,

4. employed state-of-the-art technology in the process, and

5. accomplished full effective, long term compliance with his permits.

REASONS FOR GRANTING *CERTIORARI*

A. There is a direct conflict of opinion between circuit courts on whether a citizen suit under the Act[1] will lie in the absence of an ongoing violation. [*Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985); *Chesapeake Bay Foundation, Inc.*, v. *Gwaltney of Smithfield*, 791 F.2d. 304 (4th Cir. 1986).

B. The issue is both quantitatively and qualitatively important. The precise issue of citizen imposed penalties on defendants who have achieved compliance with the law has arisen at least 18 times in the last four years. (Petition, at 22, n.15)

They arise out of a nationwide campaign of citizen suits now numbering over 400, with more likely. (*See*, *The National Law Journal*, Dec. 6, 1982, at 3; Petition at 22).

The issue is qualitatively important for at least five reasons. First, the holding of the Fourth Circuit below would appear to be at direct odds with this court's statement in *Middlesex County Sewerage Authority* v. *Sea Clammers Association*, that the act authorizes suits only for prospective relief. [453 U.S. 1, 6 (1981)].[2]

Second, assuming *arguendo* that the issue of post-achievement penalties has not been determined by *Sea Clammers*, the case presents the serious question of whether the district courts and the court of appeals below are effectuating a proper balance among policy goals,

1. The Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1982). The citizen suit provision is found at 33 U.S.C. § 1365 and will sometimes be referred to herein as Section 505 of the Act.

2. *Amici* also question whether the Fourth Circuit, and various district courts on whose decisions it relied in part, have properly understood this Court's definition of "private attorneys general" as citizens enforcing the Act as an alternate to the non-action of government agencies. Here the State of Virginia determined that compliance with the Act had been achieved and that no further enforcement action was necessary or desireable. (See Petition at 4). Respondents sued anyway.

recognized need for time and technological development for the solution of problems, and the rights and duties of plant operators, federal and state enforcement authorities, and individual citizens, all of which are reflected in the carefully drafted statute; or whether conversely, they are creating an imbalance in favor of citizen groups not contemplated by the statute, to the detriment of plant operators obedient to their duties under the Act.

Third, the issue is obviously of importance to all plant operators who have accomplished compliance or who are in the process of doing so.

Fourth, the issue presents the question of whether the imposition of post-achievement penalties would operate as an incentive or disincentive.

The Fourth Circuit assumed that the imposition of post-achievement penalties would operate as an incentive to compliance. *Amici* submit that the assumption is at a minimum questionable.

Certainly if post-achievement penalties are *not* allowed, all operators have the substantial incentive to achieve compliance as promptly as possible because to do so will reduce their penalty liability to zero, and the potential penalties during the solution period will be seen as extra returns on investments in solution equipment.

The decision to invest in any equipment, environmental or otherwise, however, is the function of many variables including as to each investment option, availability and cost of capital and the return on each such option. If penalties can be imposed whether or not compliance is achieved, the potential savings of such penalties during the solution period are removed as returned benefits on investment in solution equipment, discouraging rather than encouraging the selection of that investment option.[3]

---

3. Any reductions allowed under EPA Civil Penalty Policy [41 Env. Rep. (BNA) 2991 (1984)] introduce mere potential variables into the return on investment analysis.

Amici submit that the Fourth Circuit and the district courts of like approach have not properly understood or applied the statute's penalty incentive concept and that this Court's review is necessary for the concept's past misapplication to be righted and future misapplications avoided.

Fifth, the United States Government has expressed its view that citizen plaintiffs cannot maintain post-compliance suits for civil penalties only. (See citation of U.S. amicus brief in *Sierra Club* v. *Shell Oil*, at instant petition 20.)

C. *Amici* urge that the interpretive intervention of this Court is imperative as well because the Fourth Circuit and the district courts following similar reasoning, are creating lower court law which feeds on itself, each court citing as precedent all of their cases which have gone before. As an example of this mushrooming, please see the court below at 791 F.2d, 309-310 (Petition Appendix A, at 10a-11a).

On the surface there would appear to be little wrong with that. But that approach rejects this Court's statement in *Sea Clammers* that the Act authorizes citizen suits only for prospective relief, and adopts an expansive reading of the statute favored by those courts. (791 F.2d., at 311).

Moreover, in an apparent attempt to come out with what they view as a "good result,"[4] *i.e.*, support of clean water, those courts have, in the view of *amici*, misread plain english, misapplied basic english grammar and rules of construction and misjudged the basic concepts

---

4. No less an authority than Mr. Justice Cardozo has warned us to beware of the "good result" and of judicial zealousness which seeks desirable ends and so justifies improper judicial means. [See, *United Steel Workers of America* v. *Weber*, 443 U.S. 193, 218-219, 61 L.Ed. 2d 480, 498-499, 99 S.Ct. 2721 (1979) (Justice Burger dissenting)].

of jurisdiction and penalty. Amici note that this "good result" has or will severely injure operators who have complied with the Act and regulations thereunder without environmental benefit incremental to that the operator has achieved by compliance.

1. As petitioner has pointed out, the first paragraph of Section 505 confers subject matter jurisdiction of a citizen suit where a plant operator "is in violation" of a standard or an order. The plain meaning of those words mandates that subject matter jurisdiction will not attach unless the defendant is in violation of the time of suit. That is the reasoning of the Fifth Circuit.[5] (*See, Hamker*, 756 F.2d, at 395).

In addition, however, *amici* would point out that the language of the second paragraph of Section 505 is consistent and supportive of petitioner's and the Fifth Circuit's reading of the first paragraph.

There, district courts are granted remedial jurisdiction to enforce a standard or an order or a nondiscretionary agency duty "*and*" to impose civil penalties. The clear jurisdictional predicate is "enforce" and civil penalties are added on by "and" to cover cases in which subject matter jurisdiction has attached, enforcement is called for and in which penalties may be added.[6]

---

5. Please compare the Fourth Circuit's treatment of the statutory language in concluding that it is ambiguous. It cited *Student Public Interest Research Group v. Monsanto* [600 F. Supp. 1474, 1476 (D.N.J. 1985)] for the proposition that "a *plausible* construction of the language is that one is 'in violation' and continues to be 'in violation' by having 'violated'." (791 F.2d, at 309; Petition Appendix A, at 9a) (emphasis supplied). In rejecting clarity it reached for a plausible meaning, *i.e.*, "a meaning superficially fair, reasonable, or valuable but often specious." (*Webster's Unabridged Dictionary*, 2d Ed. 1980).

6. *Amici* suggest plain meanings of words. Webster's defines "to enforce" as "to compel observance of; as to enforce the laws."

If Congress had intended penalties to apply to wholly past activities it could easily have drafted with respect to the first part of Section 505: "is, was or has been in violation" or like language. Similarly, with respect to the second part of Section 505 it could easily have drafted: "or to impose civil penalties", or, "or to impose civil penalties or both", or like language. It did not so draft in either place.

Unlike the Fifth Circuit, however, the Fourth Circuit not only strained the clear language and grammar of the statute as drafted (*compare*, *Hamker*, 756 F. 2d, at 392) but reached for merely plausible meanings of the words in the process and so found unclarity where clarity exists.

2. It went further. In a series of presumptions and inverted logic it legislated its own jurisdiction over citizen suits for wholly past violations.

(a) "A significant deterrent would be lost if citizen suits seeking civil penalties for past violations were not permitted." [791 F. 2d, at 309-310]. The statement begs the issue. In a right case penalties may be applied but the issue is whether such penalties apply where compliance has been achieved.[7]

(b) "While it cannot be denied that citizens' enforcement authority is narrower than that of government — citizens, for example, obviously cannot seek criminal

(*Footnote continued*)

[*Webster's Unabridged Dictionary*, 2d Ed. 1980]. Black's defines "enforce" as: "to put into execution; to cause to take effect; to make effective; as, to enforce a particular law . . .; to compel obedience to." [Black's Law Dictionary, 5th Ed. (1979)].

Clearly, if one is observing and obeying the laws they need not be enforced as against him.

7. As petitioner has artfully stated, this is not a case of an operator with a "continuous" sporadic or intermittent exceedence, or one who has turned off his spigot (*cf.*, *Hamker*, 756 F. 2d, at 399, *concurring op.*), but the case of an operator who has accomplished complete compliance by the application of diligence and technical expertise. *Amici* are informed that the plant has been operating 30 months now without a non-act of God exceedence.

penalties or issue compliance orders — the Act does not deprive citizens of the right to sue for past violations." [791 F. 2d, at 310].

Again the distinction between penalties in a right case and one where compliance has been achieved was ignored and the issue begged. The question is not whether the Act *deprives* citizens of a presumed right to sue for wholly past violations but whether the Act *grants* citizens that right.

The distinction is highlighted by a case such as this where the enforcement agency affirmatively adjudged that no enforcement action was either necessary or desirable — as a deterrent or for any other reason — precisely because technology for compliance was in place and adequate to the task, which would leave no standard or limitation violated, no order violated and no non-discretionary agency duty violated.

(c) Acknowledging the distinction between the threshold issue of jurisdiction and that of remedy, the court below completed its legislative task by inverting the concepts. The Fourth Circuit said:

> Gwaltney criticizes the logic of these [district court] opinions, arguing that they confuse the threshold issue of jurisdiction with the issue of penalties available once jurisdiction attaches and liability is found. Gwaltney contends that although the Act does provide for civil penalties, and even for penalties based on past violations, no relief whatsoever is available unless there is an ongoing violation on which to ground jurisdiction under section 505(a).
>
> There is some merit to this argument, because technically the issues of jurisdiction and penalties are analytically distinct. However, the Act's provision for civil penalties in citizen suits cannot be *totally ignored*. When read in conjunction with the Act's overall structure and its

> legislative history, it suggests strongly that citizens *should be* allowed to seek civil penalties for past violations even in the absence of an ongoing violation. (791 F.2d., at 310 n. 11) (emphasis supplied)[8]

The court reasoned that because penalties exist *if* jurisdiction attaches, *therefore* jurisdiction attaches.[9]

The wisdom of this Court is needed to review and ultimately reverse such logic.

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8. As *amici* understand Gwaltney's contentions in this regard, Gwaltney acknowledged that penalties might be proper for past violations in a case where violations are ongoing, requiring enforcement of a standard or an order or a non-discretionary agency duty. That is not the case here as the State of Virginia adjudged and the physical facts of the last 30 months have proven.

9. *Amici* note the Fourth Circuit's discussion of Section 505(a)'s use of the phrase "alleged to be in violation." (791 F.2d, at 308 n.9). While the Fourth Circuit decided that it need not reach the question whether "alleged" created only the requirement of a good faith pleading to vest a court with subject matter jurisdiction, it discussed the matter at length.

It noted that the district court had looked to the analogy of the sufficiency of a good faith pleading of the amount-in-controversy in diversity jurisdiction cases.

To the extent that this Court is distracted by this argument, *amici* would point out that it is no more than another example of the lower court's hyper-attention to the existence of the penalty provision, as distinct from a proper attention to the question of jurisdiction. If diversity jurisdiction is to provide any parallel it is the diversity aspect which should be looked to.

It may be that if the parties' citizenship is diverse, a failure to plead the right amount will not oust the court of jurisdiction, but if the allegations are of diversity and it develops that no diversity exists, the federal courts will not have jurisdiction of the case no matter what degree of good faith has gone into the pleading of diversity.

Here, in parallel, if a plaintiff alleges in good faith that an operator is in violation and in good faith requests penalties, and if it develops only that penalties are not awarded, the court would not be ousted of jurisdiction assuming enforcement was necessary because the operator was not in compliance. But if the same allegations are made and the facts are that the defendant is in compliance, subject matter jurisdiction does not lie.

D. In their statement of the issue at i, *supra*, *amici* asked whether Congress intended to empower citizens to punish plant operators who had achieved compliance by the application of diligence and state-of-the-art technology.

To support their suggestion that punishment *per se* as well as the desire to profit financially are significant motivations underlying at least some of these cases, *amici*, as *amici curiae*, share with the Court salient portions of a recent memorandum of a group considering becoming plaintiffs in new cases:

> "Polluters found liable are assessed penalties. (In the only case which wasn't settled, the court assessed a $1.28 Million penalty against a company on Chesapeake Bay.) These citizen suit provisions could be utilized by NYPIRG [New York Public Interest Research Group, Inc.] to punish polluters, gain publicity, steer a significant amount of money to worthwhile environmental projects, and conceivably, to bring money to NYPIRG in the form of legal fees to attorneys and scientific 'experts.'
>
> * * *
>
> [A plaintiff's environmental] law firm has brought approximately 26 suits under the Clean Water Act against 'direct dischargers' in New York and New Jersey (in fact, NJPIRG claims that the suits they file will provide a significant source of income for them) (*sic*), Friends of the Earth and Atlantic States Legal Foundation in New York."[10-11]

---

10. NJPIRG is an acronym for New Jersey Public Interest Research Group a/k/a Student Public Interest Research Group.

11. *Cf.*, *Atlantic States Legal Foundation* v. *Al Tech Specialty Steel Corp.*, 635 F. Supp. 284 (N.D.N.Y. 1986); *Friends of the Earth* v. *Archer Daniels Midland Co.*, No. 84 Civ. 413 (N.D.N.Y. 1986); *Friends of the Earth* v. *Consolidated Rail Corp.*, 768 F.2d 57 (Cir.

(Memorandum, Randall Weiner, Water Hangg and Alison Kelly to NYPIRG Executive Committee re Clean Water Act Citizen Suits, July 19, 1986).

Whatever be the rights of plaintiff groups in other situations,[12] *amici* suggest that the foregoing statements highlight the importance of review by this Court to determine whether the Act contemplates citizen actions, always purely punitive and at least sometimes prompted by the desire for personal profit, against plant operators who have already expended and applied all the time, money, diligence and expertise necessary to accomplish compliance, who in fact stand in obedience to the law, and who have attained all the environmental benefits of compliance.

E. Similarly, *amicus* Consumer Alert urges such review because of its concern that penalties superimposed on the expenditures, capital and otherwise, already incurred to accomplish compliance will ultimately be paid by consumers of food products in the form of higher prices.

(Footnote continued)

1985); *Friends of the Earth* v. *Facet Enterprises, Inc.*, 618 F. Supp. 532 (W.D.N.Y. 1984); *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 617 F. Supp. 1190 (D.N.J. 1985); *Student Public Interest Research Group* v. *Anchor Thread Co.*, 22 Env't. Rep. Cas. (BNA) 1150 (D.N.J. 1984); *Student Public Interest Research Group* v. *Georgia-Pacific Corp.*, 615 F. Supp. 1419 (D.N.J. 1985); *Student Public Interest Research Group* v. *Monsanto Co.*, 600 F. Supp. 1474 (D.N.J. 1985); *Student Public Interest Research Group* v. *National Starch and Chemical Corp.*, 23 Env't. Rep. Cas. (BNA) 1982 (D.N.J. 1985); *Student Public Interest Research Group* v. *P.D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074 (D.N.J. 1986).

12. The case does not present the question of the propriety or impropriety of penalties in suits where compliance has not been achieved and *amici* do not address that issue.

Cases such as the one at bar are wholly punitive as distinct from remedial and the defendant stands before the court not as a polluter but as an operator compliant with his environmental duties.

Consumers will be obligated to pay through higher prices the costs of attaining compliance. The addition of substantial civil penalties in punishment of a compliance achiever would operate as punishment of the consuming public without environmental benefit.

Amici suggest that such unfair results are unlikely to have been intended by Congress.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition and issue a writ of *certiorari*.

Respectfully submitted,

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I, Richard B. McGlynn, Counsel of Record for *amici curiae* Mid-Atlantic Legal Foundation, *et al.*, certify that on the 24th day of November, 1986, I caused to be served three (3) copies of the attached motion and brief on the following:

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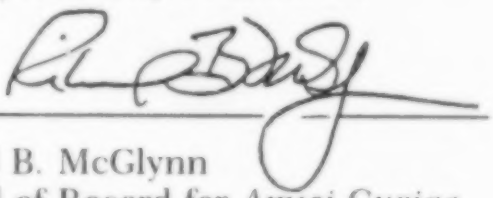

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Counsel for Respondents

* Counsel of Record

PETITION FOR CERTIORARI FILED SEPTEMBER 23, 1986
CERTIORARI GRANTED JANUARY 12, 1987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-473

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,

and

NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, *et al.*,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1984		
June 15	1	Complaint filed. No jury demand.
June 15	—	Summons issued & mailed to atty. for service.
June 22	2	Pltf's Decline to jurisdiction of Magistrate, filed
June 29	3	Pltfs' Statement of Material Facts Not In Dispute In Support For Their Motion For Summary Judgment, filed.
June 29	4	Pltfs' Memorandum of Law, filed.
June 29	5	Affidavit of Jeter M. Watson, filed.
June 29	6	Pltfs Notice of Motion, filed.
July 2	—	Acknowledgement of summons, executed, filed.
July 5	7	Deft's Answer to Complaint, No Jury, filed, with Motion.
July 23	8	Pltfs' Response To Deft's Answer & Motion To Dismiss, filed.

DATE	NR.	PROCEEDINGS
1984		
July 25	9	PTO, Non-Jury, ent'd 7-25-84 (RRMjr) filed. Copies to counsel at PTC.
July 25	10	Motion for Judgment on the Pleadings filed by the Pltf.
Aug. 20	11	Notice of Hearing on August 28, 1984 at 2:00 p.m., Filed.
Aug. 28		IN OPEN COURT: MERHIGE, J. HALASZ, OCR APPEARANCES: PARTIES BY COUNSEL. DEFT'S MOTION TO DISMISS HEARD; DENIED. PLTFS' MOTION FOR PARTIAL SUMMARY JUDGMENT HEARD; GRANTED. ORDER TO ENTER. (21 Mins.)
Aug. 30	12	ORDER, denying deft's motion to dismiss; denying deft's motion to abstain: pltf's motion for partial summary judgment is GRANTED etc. Ent. by RRM, JR. on 08/30/84 & filed. Cps. mailed.
Sept. 4	13	Deft's Motion for Rehearing, Filed.
Sept. 10	14	Pltfs' Opposition to Deft's Motion For Rehearing, filed.
Oct. 5	—	Transcript of Hearing before Hon. RRM, JR. on 08/28/84 In I Vol., filed.
Oct. 10	15	Pltf's Motion For Expedited Discovery & Expedited Proceedings on the Remedy, filed.
Oct. 16	16	ORDER, that discovery is extended through 12/14/84; Parties to file proposed findings of fact by noon 12/14/84. Deft's motion for rehearing is DENIED. Ent. by RRM, JR. on 10/16/84 & filed. Cps. mailed.
Oct. 16	17	Deft's Answer, filed. No jury demand.

DATE	NR.	PROCEEDINGS
1984		
Oct. 16	18	Deft's Memorandum In Support of Motion For Rehearing, filed.
Oct. 17	19	Pltf's Motion To Set Trial Date, filed.
Oct. 26	20	Deft's Motion For Reconsideration, filed.
Oct. 30	21	ORDER, that the portion of this Court's Order of 10/16/84 denying deft's motion for a rehearing is VACATED. Argument on said motion etc. is scheduled for 11/15/84 at 8:00 A.M. Ent. by RRM,JR. on 10/30/84 & filed. Cps. mailed.
Nov. 5	22	Pltfs' Motion to Strike and Brief in Support, filed.
Nov. 6	23	Pltfs' Status Hearing Memorandum, Filed.
Nov. 16	24	ORDER, that deft's Motion For Rehearing is GRANTED & the Order of 08/30/84 is Amended to Provide that the deft. violated the Federal Water Pollution Control Act, etc. Briefing schedule set. Ent. by RRM,JR. on 11/16/84 & filed. Cps. mailed.
Dec. 16	25	Pltfs' Notice of Deposition of J. Willis Sneed on December 11, 1984, Filed.
Dec. 16	26	Pltfs' Notice of Depositions of Joseph Luter, III, Henry Morris, Terry Rettig & Kenneth Brown, Filed.
Dec. 6	27	Pltfs' Request for Entry Upon Land, Filed.
Dec. 14	28	Pltf's Proposed Findings of Fact & Conclusions of Law, filed.
Dec. 17	29	Parties Stipulation, filed.
Dec. 17	30	Deft's Proposed Findings of Fact & Conclusions of Law, filed. (Exhibits to this are in a brown expandable next to case file)

DATE	NR.	PROCEEDINGS
1984		
Dec. 18	31	Pltfs' Witness List, filed.
Dec. 18	32	Pltfs' Exhibit List, filed.
Dec. 18	33	Deft's Witness List, filed.
Dec. 18	34	Deft's Exhibits List, filed. (Copies of Exhibits attached to this List)
Dec. 18	35	Pltf's Trial Memorandum, filed.
Dec. 19		TRIAL PROCEEDINGS: MERHIGE, J. HALASZ, OCR APPEARANCES: PARTIES BY COUNSEL. MATTER CAME ON FOR TRIAL ON MERITS. OPENING WAIVED BY THE PLTFS. OPENING MADE BY THE DEFT. PLTF ADDUCED EVIDENCE; RESTED. DEFT ADDUCED EVIDENCE; RESTED. EVIDENCE CONCLUDED. DEFT TO FILE POST-TRIAL BRIEF BY 1-15-85; PLTFS TO RESPOND W/N 7 DAYS THEREAFTER IF THEY DEEM IT NECESSARY. CASE TAKEN UNDER ADVISEMENT. (5 Hrs. 36 Mins.)
1985		
Jan. 11	—	Transcript of Trial Proceedings held on 12/19/84 in I Vol., filed.
Jan. 16	36	Deft's Post-Trial Memorandum, Filed.
Jan. 29	37	Pltfs' Motion For Leave To Amend The Complaint Or In The Alternative Join A Party Deft., filed.
Jan. 29	38	Pltfs' Response To Defts' Post-Trial Memorandum, filed.
Feb. 11	39	ORDER, giving Ralston Purina Co. through 02/25/85 within which to file a response to pltfs' Motion To Amend etc. Ent. by RRM,Jr. on 02/11/85 & filed. Cps. mailed.

DATE	NR.	PROCEEDINGS
1985		
Feb. 25	40	Non-Party Continental Baking Co.'s Memorandum In Opposition to Pltfs' Motion To Amend Their Complaint Or In The Alternative To Join A Party Deft., filed.
Mar. 8	41	ORDER, extending through 03/31/85 the time within which Pltfs' must respond to Continental Baking Co's Memorandum In Opposition to Pltf's Motion To Amend, etc. Ent. by RRM,JR. on 03/08/85 & filed. Cps. mailed.
Apr. 2	42	Pltfs' Reply To Continental Baking Co's, Memorandum In Opposition To Pltfs' Motion To Amend Their Complaint Or In The Alternative To Join A Party Deft., filed.
May 16	43	Deft's Motion To Dismiss For Lack of Jurisdiction, filed.
May 16	44	Deft's Memorandum In Support of Motion To Dismiss for Lack of Jurisdiction, filed.
May 24	45	ORDER that Pltfs have ten (10) days from the date of this Order to file an opposing memorandum, entered by RRM, JR. on 5/24/85 & Filed. Copies Mailed.
May 24	46	Pltf's Memorandum In Opposition To Deft's Motion To Dismiss, filed.
June 6	47	Deft's Reply Memorandum In Support of Motion To Dismiss for Lack of Jurisdiction, filed.
June 26	48	Memorandum of the Court ent. by RRM,JR. on 06/24/85 & filed.
June 26	49	JUDGMENT ORDER, that deft's motion to dismiss is hereby DENIED: Deft., Gwaltney of Smithfield, Ltd., is declared to have been in violation of the Clean Water Act etc.; deft. enjoined until further Order of the Court to provide ptlfs' with a copy of all reports said deft.

DATE	NR.	PROCEEDINGS
1985		
		submits to state or federal government relating to its NPDES permit etc. Deft. shall pay civil penalties in accord with the Court's memorandum in the sum of $1,285,322 with interest from this day forward; counsel for the respective parties shall meet to confer re: atty. fees etc. if they fail to agree appropriate affidavits shall be filed with the
June 26	—	(Cont.) Court no later than 20 days from this date. Ent. by RRM,JR. on 06/26/85 & filed. Cps. mailed.
June 26	50	Pltfs' Application For Atty. Fees & Expenses (with attachments), filed.
July 24	51	Deft's, Gwaltney's, Motion For Extension of Time, filed.
July 25	52	Findings of Fact & Conclusions of Law As Stated From The Bench by Hon. RRM,JR., filed.
July 25	53	Deft's Notice of Appeal, filed. ($70.00 fee pd.)
July 26	54	ORDER, granting deft's motion for extension of time to respond to the application for atty. fees through 08/02/85 ent. by DDW on 07/26/85 & filed. Cps. mailed.
Aug. 9	55	Deft's Answer to Pltf's Application For Costs & Fees, filed.
Aug. 12	56	ORDER, that the time within which deft. may respond to pltf's application for atty. fees is extended through 08/09/85 ent. by RRM,JR. on 08/12/85 & filed. Cps. mailed.
Aug. 21	—	Clerk's Certificate

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1873

CHESAPEAKE BAY FOUNDATION, INC.;
NATURAL RESOURCES DEFENSE,
Appellees,

versus

GWALTNEY OF SMITHFIELD, LTD.,
Appellant.

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
08-26-85	Case docketed. ROA filed. bhr
08-27-85	BRIEFING ORDER, filed. A due 10-07-85. Tentative Calendar for December, 1985 session. bhr
08-27-85	ORDER requiring a joint brief per side, filed. bhr.
09-06-85	DISCLOSURE STATEMENT A, Y, filed. bhr
09-06-85	DISCLOSURE STATEMENT E, N, filed. bhr
09-10-85	DISCLOSURE STATEMENT E (Natural Resources), N, filed. bhr
11/7/85	MOTION (K-44) of Friends of Earth, Sierra Club, Student Public Interest Research Group of New Jersey, Connecticut Fund for the Environment and Atlantic States Legal Foundation for leave to file brief amici curiae on behalf of Es, filed (BHR:jm)
11-12-85	MOTION (K-67) of Es to supplement the appendix, filed (BHR:cw)

DATE	FILINGS—PROCEEDINGS
11-12-85	MOTION (K-68) of Es to supplement the record, filed (BHR:cw)
11-13-85	RESPONSE OF A (Gwaltney) in opposition of motion for leave to file amicus brief. filed. bhr
11-19-85	RESPONSE of applicant's of the amicus brief in opposition to A's response, filed. bhr
11-19-85	MOTION (K-100) of A to extend page limitation of reply brief, filed. bhr
11-20-85	RESPONSE OF E (Chesapeake) to motion for filing the amicus brief, filed. bhr
11-20-85	MOTION (K-44) to file amicus brief; A's response in opposition to motion; applicant's response to A's opposition; E's response to amicus motion mailed to JHW. bhr
11-20-85	MOTION (K-100) of A for extending page limitation of reply brief mailed to JHW. bhr
11/21/85	APPELLANT'S OPPOSITION (K-68) to Es' motion supplement the record, filed (BHR:nac)
11/22/85	Transmitted Es' motion to supplement the appendix; Es' motion to supplement the record on appeal; and A's opposition to Es' motion to supplement the record to JHW. (BHR:nac)
12/2/85	ORDER granting motion K-44, filed (BHR:jm) Copy to Troy; Raher-Hayes-LaCroix; Watson; Thornton; Powers; Terris-Black; Unterberger-Ojala; Habicht-Firestone-Shilton-Lees
12/2/85	ORDER granting motions K-67, K-68 & K-100, filed (BHR:jm) Copy to Troy; Raher-Hayes-LaCroix; Watson; Thornton; Powers; Terris-Black; Unterberger-Ojala; Habicht-Firestone-Shilton-Lees
01-08-86	MOTION (A-6) of A to supplement the record, filed. bhr

DATE	FILINGS—PROCEEDINGS
1/13/86	MOTION (A-8) of USA-AC for permission to participate at oral argument, filed (BHR:jm) Transmitted to HLW, DSR, JMS on 1/13/86
01-16-86	RESPONSE (A-6) of amicus curiae, US, to A's motion to supplement the record, filed (DHB:cw)
01-16-86	RESPONSE of E to A's motion to supplement the record, filed (DHB:cw)
01-21-86	RESPONSE of amici curiae, Friends of the Earth, etc. to motion to supplement the record, filed (DHB:cw)
01-21-86	Transmitted A's motion to supplement the record (A-6); response of the amicus curiae, US to motion A-6; E's response to motion A-6 and response of amici curiae, Friends of the Earth, etc. to HLW, DSR and JMS.
01-21-86	RESPONSE to motion (A-8) of Amicus, US, to participate in argument, filed (Five minutes ceded by Es), (DHB:cw)
1/27/86	REPLY to CBF's opposition to Gwaltney's motion to supplement the record, filed (BHR:jm) Transmitted to HLW, DSR, JSM on 1/27.
01-29-86	ORDER granting A's motion to supplement the record, filed (BHR:cw) Copy of order sent to Troy; Raher-Hayes-LaCroix; Watson; Thornton; Powers; Unterberger-Ojala; Terris-Black and Lees.
1/21/86	Letter to counsel (A-8) advising amicus may argue if ceded 5 minutes from counsel (BHR:jm)
06/05/86	PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC /(A-151 of A, filed (SAR:cw) Transmitted to HLW, DSR, JMS with copies to circuit judges on 06/06/86.

DATE	FILINGS—PROCEEDINGS
6/5/86	MOTION (A-152) of Es for attorney fees and expenses, filed. jd
6/25/86	ORDER denying petition A-151, filed (SAR:jm) Copy to all counsel of record
06/13/86	LETTER from E's counsel, Watson, with attachments, filed (SAR:cw)
06/30/86	RESPONSE of A to motion for attorney fees and expenses, filed (SAR:cw)
07/03/86	Transmitted Es' motion for attorney fees and expenses, with attachments; letter from E's counsel, with attachments; A's response to motion for attorney fees and expenses to HLW; DSR and JMS.
07/03/86	MOTION (A-182) of A for stay of mandate, filed (SAR:cw) Transmitted to HLW; DSR and JMS along with the above transmittal.
7/9/86	REPLY of E's (A-152) to A's response to motion for attorney fees and expenses, filed. BMM:cb
7/10/86	TRANSMITTED E's reply to HLW, DSR, JMS, BMM:cb
8/5/86	ORDER that the motion for attorney's fees and expenses is referred to the d/ct. for decision; this court granted stay of mandate pending A's timely application to U.S.S.Ct. for a writ of certiorari, filed. SAR:gac (See order further explanation)
8/5/86	ORDER that the mandate in this case be, and is hereby, stayed pending timely application of the A to the S.Ct. of U.S. for writ of certiorari, filed. SAR:gac Copies of both orders of 8/5/86 to Counsel of Record.

COMMONWEALTH OF VIRGIN

NATIONAL POLLUTANT DISCH
DISCHARGE MONI

PERMITTEE NAME/ADDRESS (INCLUDE FACILITY NAME/LOCATION IF DIFFERENT)

NAME ITT GWALTNEY, INC

ADDRESS

SMITHFIELD VA 23430

FACILITY LOCATION

FILE NO. 22-2240.

PARAMETER		QUANTITY OR LOADING		
		AVERAGE	MAXIMUM	UNITS
001 FLOW	REPORTED	1,068	1,438	MGD
	PERMIT REQUIREMENT			
002 PH	REPORTED	**********	**********	
	PERMIT REQUIREMENT	**********	**********	
003 BOD5	REPORTED	39.4	89.0	KG/D
	PERMIT REQUIREMENT	174.0000	347.0000	
004 TOTAL SUS. SOLIDS	REPORTED	157.1	236.9	KG/D
	PERMIT REQUIREMENT	228.0000	455.0000	
005 TOTAL CL2	REPORTED	**********	**********	
	PERMIT REQUIREMENT	**********	**********	
006 FECAL COLIFORM	REPORTED	**********	**********	
	PERMIT REQUIREMENT	**********	**********	
069 TKN (N-KJEL)	REPORTED	123.0	220.5	KG/D
	PERMIT REQUIREMENT	109.0000	219.0000	
500 OIL & GREASE	REPORTED	4.8	16.1	KG/D
	PERMIT REQUIREMENT	78.0000	156.0000	

ADDITIONAL PERMIT REQUIREMENTS OR COMMENTS

BYPASSES AND OVERFLOWS	TOTAL OCCURRENCES	TOTAL FLOW (M.G.)	TOTAL BOD5 (K G)
	-	-	-

Terry L. Ret

TYPED OR PRINT

PRINCIPAL EXE

I CERTIFY UNDER PENALTY OF LAW THAT I HAVE PERSONALLY EXAMINED AND AM FAMILIAR WITH THE INFORMATION SUBMITTED IN THIS DOCUMENT AND ALL ATTACHMENTS AND THAT, BASED ON MY INQUIRY OF THOSE INDIVIDUALS IMMEDIATELY RESPONSIBLE FOR OBTAINING THE INFORMATION I BELIEVE THE SUBMITTED INFORMATION IS TRUE, ACCURATE AND COMPLETE. I AM AWARE THAT THERE ARE SIGNIFICANT PENALTIES FOR SUBMITTING FALSE INFORMATION, INCLUDING THE POSSIBILITY

Henry T. Mar

EXHIBIT 10

A STATE WATER CONTROL BOARD
INDUSTRIAL MAJOR 07/14/81
STATE WATER CONTROL BOARD (REGIONAL OFFICE)

VA0002844 (PERMIT NUMBER) 001 (DISCHARGE NUMBER)

TIDEWATER REGIONAL OFFICE
287 PEMBROKE OFF. PARK
SUITE 310 PEMBROKE 2
VIRGINIA BEACH, VA. 23462

MONITORING PERIOD
FROM YEAR 84 MO 5 DAY 1 TO YEAR 84 MO 5 DAY 31

NOTE: Read instructions before completing this form.

QUALITY OR CONCENTRATION				NO. EX	FREQUENCY OF ANALYSIS	SAMPLE TYPE
MINIMUM	AVERAGE	MAXIMUM	UNITS			
				0	Cont	Rec
					CONT	REC
6.9		7.6		0	3 D/W	Grab
6.0000		8.5000	SU		3 D/W	GRAB
				0	3 D/W	24 HC
					3 D/W	24HC
				0	3 D/W	24 HC
					3 D/W	24HC
1.5		2.50		0	1/M	Grab
1.5000		2.5000	MG/L		1/M	GRAB
	2.1	20.0		0	3 D/W	Grab
	200.0000	400.0000	N/CML		3 D/W	GRAB
				2	3 D/W	24 HC
					3 D/W	24HC
				0	3 D/W	Grab
					3 D/W	GRAB

OPERATOR IN RESPONSIBLE CHARGE			DATE		
ig		000435	84	6	8
D NAME	SIGNATURE	CERTIFICATE NO.	YEAR	MO	DAY
UTIVE OFFICER OR AUTHORIZED AGENT		TELEPHONE	DATE		
ig		804 | 357-4321	84	6	8

COMMONWEALTH OF VIRGINIA STAT

NATIONAL POLLUTANT DISCHARGE ELIMI
DISCHARGE MONITORING R

PERMITTEE NAME/ADDRESS (INCLUDE FACILITY NAME/LOCATION IF DIFFERENT)

NAME ITT GWALTNEY, INC

ADDRESS

SMITHFIELD VA 23430

FACILITY LOCATION

FILE NO. 22-2240. FROM

PARAMETER		QUANTITY OR LOADING		UNITS	QUALITY
		AVERAGE	MAXIMUM		MINI
001 FLOW	REPORTED	1.01	1.390	MGD	*****
	PERMIT REQUIREMENT				*****
002 PH	REPORTED	**********	**********		7
	PERMIT REQUIREMENT	**********	**********		6
003 BOD5	REPORTED	46.9	88.5	KG/D	*****
	PERMIT REQUIREMENT	174.0000	347.0000		*****
004 TOTAL SUS.SOLIDS	REPORTED	137.2	283.2	KG/D	*****
	PERMIT REQUIREMENT	228.0000	455.0000		*****
005 TOTAL CL2	REPORTED	**********	**********		1
	PERMIT REQUIREMENT	**********	**********		
006 FECAL COLIFORM	REPORTED	**********	**********		*****
	PERMIT REQUIREMENT	**********	**********		*****
068 TKN (N-KJEL)	REPORTED	145.3	217.6	KG/D	*****
	PERMIT REQUIREMENT	109.0000	219.0000		*****
500 OIL & GREASE	REPORTED	9.3	43.4	KG/D	*****
	PERMIT REQUIREMENT	78.0000	156.0000		*****

ADDITIONAL PERMIT REQUIREMENTS OR COMMENTS

BYPASSES AND OVERFLOWS	TOTAL OCCURRENCES	TOTAL FLOW (M.G.)	TOTAL BOD5 (KG)
	-	-	-

Terry L. Rettig

TYPED OR PRINTED NAM

PRINCIPAL EXECUTIVE

Henry L. Morris

I CERTIFY UNDER PENALTY OF LAW THAT I HAVE PERSONALLY EXAMINED AND AM FAMILIAR WITH THE INFORMATION SUBMITTED IN THIS DOCUMENT AND ALL ATTACHMENTS AND THAT BASED ON MY INQUIRY OF THOSE INDIVIDUALS IMMEDIATELY RESPONSIBLE FOR OBTAINING THE INFORMATION I BELIEVE THE SUBMITTED INFORMATION IS TRUE, ACCURATE AND COMPLETE. I AM AWARE THAT THERE ARE SIGNIFICANT PENALTIES FOR SUBMITTING FALSE INFORMATION, INCLUDING THE POSSIBILITY OF FINE AND IMPRISONMENT. SEE 18 U.S.C. § 1001 AND 33 U.S.C. § 1319. [illegible]

WATER CONTROL BOARD
INDUSTRIAL MAJOR 07/14/81
STATE WATER CONTROL BOARD (REGIONAL OFFICE)

A0002R44 (PERMIT NUMBER) | 001 (DISCHARGE NUMBER)

TIDEWATER REGIONAL OFFICE
287 PEMBROKE OFF. PARK
SUITE 310 PEMBROKE 2
VIRGINIA BEACH, VA. 23462

MONITORING PERIOD: YEAR 84 MO 3 DAY 1 TO YEAR 84 MO 3 DAY 31

NOTE: READ ITEMS 12 AND GENERAL INSTRUCTIONS BEFORE COMPLETING THIS FORM.

CONCENTRATION				NO. EX	FREQUENCY OF ANALYSIS	SAMPLE TYPE
UM	AVERAGE	MAXIMUM	UNITS			
				0	Cont	Rec
					CONT	REC
3		8.0		0	3 D/W	Grab
.0000		8.5000	SU		3 D/W	GRAB
				0	3 D/W	24 HC
					3 D/W	24HC
				0	3 D/W	24 HC
					3 D/W	24HC
50		2.50		0	1/H	Grab
.5000		2.5000	MG/L		1/H	GRAB
	5.8	160.0		0	3 D/W	Grab
	200.0000	400.0000	N/CML		3 D/W	GRAB
				0	3 D/W	24 HC
					3 D/W	24HC
				0	3 D/W	Grab
					3 D/W	GRAB

OPERATOR IN RESPONSIBLE CHARGE			DATE		
	000435		84	4	6
SIGNATURE	CERTIFICATE NO.		YEAR	MO	DAY
OFFICER OR AUTHORIZED AGENT	TELEPHONE		DATE		
	804	357-4321	84	4	6
	AREA	NUMBER	YEAR	MO	DAY

EXHIBIT 25

[SEAL]

COMMONWEALTH OF VIRGINIA
STATE WATER CONTROL BOARD
2111 Hamilton Street

[Mar. 12, 1984]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
P33 0329995

Mr. Joseph Luter
Chairman of the Board
Smithfield Foods, Inc.
P.O. Box 447
Smithfield, Virginia 23430

Dear Mr. Luter:

Gwaltney of Smithfield, Ltd., has violated Total Kjeldahl Nitrogen (TKN) effluent limits in its NPDES Permit for some time. Since Smithfield Foods assumed ownership of the Company, the limit was violated five months in 1982 and in January through May 1983. TKN violations recurred in September 1983 and have continued since that time.

The staff requested plans and a schedule to address the TKN violations in the spring of 1982.

In August, 1982, the company submitted a preliminary concept engineering report prepared by your consultant. This was, however, followed by an actual proposal from the company that differed in several important aspects from the consultant's report. After several requests for additional data from the staff, the Company submitted a final concept report in January, 1983. This final report substantially revised the Company's proposal.

The Executive Director approved the final report in May 1983 and requested an implementation schedule.

The Company submitted a schedule that called for beginning construction in June, completing construction in August, and meeting limits in early October, 1983. Although the staff had verbally requested monthly status reports on the construction from the company, no report was submitted until August 26 after a written staff request. This report showed that the schedule was not being met and the Company would be unable to meet the date for completing construction.

The planned modifications to the treatment system were completed in November, 1983. However, due to remedial work at Smithfield Food's Smithfield Packing Company, a major upset occurred in Gwaltney's treatment system just as the newly modified system was being brought on line.

The remedial program at Smithfield called for pumping sludge from the treatment facility to an abandoned anaerobic lagoon at Gwaltney and for excess liquid to go through the Gwaltney treatment system. While this plan was being carried out, a period of heavy rainfall occurred. No flow control capability had been installed within the Gwaltney system to control flows between the abandoned lagoons and the newly modified system. Gwaltney's effluent pumps could not handle the added flows from Smithfield and from the rainfall. Water levels rose through the Gwaltney system, causing hydraulic overloading.

What is particularly disturbing to the staff is that pumping from the Smithfield facility continued instead of being curtailed or stopped soon enough to avoid an upset to the Gwaltney system.

Despite the company's schedule calling for compliance in October 1983, the facility continues to violate its permit.

We have been unsuccessful in our efforts to bring the facility into compliance for such a long period that we intend to discuss this matter with our Board at its March meeting. The Board may have questions of the Company and may discuss possible legal action for the violations so you may wish to be present during the staff's presentation to the Board in this matter.

The staff's report is scheduled for March 26 at 9:00 a.m. or as soon thereafter as possible depending on other matters that are on the agenda. The Board's meeting will be in Senate Room B, General Assembly Building, 9th and Broad Streets in Richmond.

If you have any questions concerning the Board meeting, please contact Anne Field in our Bureau of Enforcement (804/257-6?55).

Sincerely,

/s/ Richard N. Burton
RICHARD N. BURTON
Executive Director

/dd

Copies: Tidewater Regional Office, SWCB
Bureau of Applied Technology, SWCB
Bureau of Enforcement, SWCB
Attorney General's Office

EXHIBIT 27

[LOGO]

SMITHFIELD FOODS, INC.
P.O. Box 447
Smithfield, Virginia 23430
(804) 357-4321

April 6, 1984

Mr. Terence Switzer
State Water Control Board
Tidewater Regional Office
287 Pembroke Office Park
Suite 310, Pembroke II
Virginia Beach, Virginia 23462

Re: *Permit Number VA 0002844*

Dear Mr. Switzer:

This is to inform you that we have met all of our permit requirements for the month of March, 1984. The only parameter that we fell short in was the TKN monthly average. Our permit requires a 109 Kg/d average while we obtained a 145.3 Kg/d average. I attribute this to the high rainfall which increased our effluent flows.

Sincerely,

/s/ Terry L. Rettig
TERRY L. RETTIG
Wastewater Systems Manager

/eb

EXHIBIT 55

[LOGO]

WELLS ENGINEERING, INC.
11237 Chicago Circle
Omaha, Nebraska 68154
(402) 330-0202

July 22, 1982

Re: Gwaltney of Smithfield
Smithfield, Virginia
WE #820602

Tidewater Regional Office
State Water Control Board
287 Pembroke Office Park
Suite 310, Pembroke 2
Virginia Beach, Virginia 23462

Gentlemen:

Transmitted herewith are three copies of the Concept Engineering Report for the referenced project. This report contains adequate information to support the concept for the proposed interim and permanent modifications to the existing waste treatment facilities and we request approval of this document.

Very truly yours,

WELLS ENGINEERS, INC.

/s/ W. James Wells, Jr.
W. JAMES WELLS, JR., P.E.
President

WJW:jlk

Encls.

CONCEPT ENGINEERING REPORT

MODIFICATIONS TO
WASTE TREATMENT FACILITIES

GWALTNEY OF SMITHFIELD, LTD
SMITHFIELD, VIRGINIA

PREPARED BY:

WELLS ENGINEERS, INC.
11237 CHICAGO CIRCLE
OMAHA, NEBRASKA 68154
402/330-0202

COMMISSION NO. 820602

JULY, 1982

[SEAL]

CONCEPT ENGINEERING REPORT

MODIFICATIONS TO WASTE TREATMENT FACILITIES

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CONCEPT ENGINEERING REPORT

MODIFICATIONS TO WASTE TREATMENT FACILITIES

GWALTNEY OF SMITHFIELD, LTD. SMITHFIELD, VIRGINIA

I. INTRODUCTION

The purpose of this report is to describe modifications to the existing waste treatment facilities which are required to meet the requirements of the discharge on an interim basis and on a permanent basis. The existing treatment facilities experience difficulties meeting the TKN limitations during cold weather and suspended solids limits during warm weather. The scope of the report includes a description of plant operation, existing pretreatment and waste treatment facilities, presentation of sampling and operating data, effluent limitations and design criteria, discussion of an interim and permanent solutions, and cost estimates for construction, as well as additional annual operation and maintenance expenses.

II. WASTEWATER SOURCES

The Gwaltney plant at Smithfield, in southeast Virginia, is a hog slaughtering and processing facility. The present daily kill is approximately 4500 hogs per day at about 230 lb/hog. The kill and cut are one shift operations five days/week, while processing is a two shift operation five or six days/week. All hogs slaughtered at this plant are boned and fabricated into prepared meat products including weiners, sausages, luncheon meat and country hams. Some beef trimmings are brought in for incorporation into the processed meat products.

* * * *

VII. DESIGN APPROACH AND METHODS

Both interim and permanent solutions to the problem of meeting the requirements of the discharge permit have been evaluated and will be discussed in this section. In both cases, after pretreatment, effluent from the packing plant will be directed to Anaerobic Lagoon No. 1. With an estimated volume of 6.75 million gallons, this anaerobic will have an organic loading of 17.5 lb BOD/1000 ft^3/day and a detention time of nearly one week, both very acceptable values. The design effluent from this lagoon is furnished in Section V of this report and is far more conservative than actual performance achieved during the sampling program.

A. *Interim Solution*

In this case, a new Anaerobic Effluent Control Structure will be constructed. This structure will include simple provisions to partially equalize the flow. This will be accomplished by allowing the water level in the anaerobic lagoon to rise and fall throughout the week. Flow will be directed from this structure through a new gravity line to the northern half of the last lagoon (settling pond).

The northern half of the final lagoon will be utilized as an aeration basin. A floating baffle wall will be used to segregate the new aeration basin portion from the remainder of the lagoon. This baffle wall will be anchored on both sides of the lagoon and consists of a reinforced Hypalon or vinyl-type fabric, weighted on the bottom with a chain and suspended from foam floats.

The nine existing 25-Hp floating surface aerators will be relocated to this aeration basin and will provide aeration capacity for BOD reduction and nitrification of ammonia. These aerators will also serve to maintain mixed liquor suspended solids (MLSS) in suspension.

With an aeration volume of 2.75 million gallons and an equalized influent flow of one million gallons per day, the detention time would be 2.75 days. However, significant amounts of storm water runoff enters the various lagoons so flows will occasionally be as high as 2.3 mgd, resulting in a detention time of 1.2 days. Solids retention times of 15 days or longer (MLSS levels greater than 1400 mg/l) will result in good ammonia nitrification, as long as the aeration basin mixed liquor temperatures remain above 10°C. Nitrification may be inhibited by wastewater temperatures below 10°C which can occur during severe winter conditions. Also, the variable flow rate due to storm water runoff will increase the difficulty of operating this activated sludge system.

Theoretically, 7.2 pounds of alkalinity are required per pound of ammonia nitrified. This results in a maximum alkalinity requirement of 9144 lb/day. Approximately 7250 lb/day of alkalinity are available in the anaerobic effluent, indicating the pH may be depressed by nitrification which would inhibit further nitrification. However, alkalinity in amounts less than the theoretical requirement have often proved sufficient. This is due to several reasons: 1) some denitrification of the nitrified flow occurs which returns half of the alkalinity to the system and 2) some nitrogen is bound up with the waste activated sludge and is removed from the system. Consequently, no provisions are proposed for the addition of alkalinity. If pH depression and nitrification inhibition does occur, lime can be added manually with the relatively small amounts that would be required.

After aeration, the two existing self-priming pumps will pump the flow to the two existing final clarifiers. Based on the peak projected flow rate of 2.3 mgd, the surface overflow rate of these clarifiers will be 585 gpd/ft^2 and the weir overflow rate will be 7,615 gpd/ft, both acceptable values.

Sludge settling in the final clarifiers will be directed to the existing sludge pumping station and either be returned to the influent end of the aeration basin through a new line or wasted to the existing sludge lagoon through the present line.

Treated effluent will be pumped to the existing chlorination facilities for disinfection and discharged through the outfall line to the Pagan River.

B. *Permanent Solution*

In this case, the two existing self-priming pumps will be relocated and used to pump effluent from the anaerobic at a constant rate of approximately 700 gpm. To achieve this equalized flow rate, the level in the anaerobic lagoon will be allowed to rise and fall throughout the week. Anaerobic effluent will be pumped to a new Aeration Basin Splitter Structure which will equally divide the flow between two new aeration basins.

The new aeration basins will be constructed northeast of the existing final clarifiers. Each concrete basin will hold 0.75 mgd for a total retention time of 1.5 days at 1.0 mgd. Both basins will be constructed with vertical and sloped sides and have a depth varying from 3.5 feet at the sidewall to 15 at the bottom.

A maximum of 450 lb/hr of oxygen will be required for BOD reduction and ammonia nitrification. Aeration will be provided by either fine-bubble dome diffusers or possibly with a jet aeration system.

With a solids retention time of 15 days or greater, nearly complete nitrification will be achieved at MLSS levels greater than 2500 mg/l. With a relatively small surface area and a subsurface aeration system, mixed liquor temperatures will be maintained above 10°C so nitrification will not be inhibited, even during severe winter weather. Also, construction of the new aeration basins will eliminate wide flow variations due to storm water runoff.

As discussed previously, if alkalinity addition proves necessary, small amounts of bagged hydrated lime can be added manually.

After aeration, the flow will enter a new Clarifier Splitter Structure which will equally divide the flow between the two existing final clarifiers.

At an equalized flow rate of 1.0 mgd, the surface overflow rate of both clarifiers will be 255 gpd/ft^2 and the weir overflow rate will be 3310 gpd/ft, both low values. However, with an 8.5 ft side water depth and without surface skimmers and rapid sludge drawoff mechanisms, these clarifiers are not of an optimum design for a nitrifying activated sludge system.

Settled sludge will either be returned to the splitter structure ahead of the activated sludge system or wasted to the existing sludge lagoon.

Clarified effluent will be pumped to the existing chlorine contact chamber for disinfection prior to discharge to the Pagan River.

C. *Discussion and Recommendations*

There are several unknowns involved with the proposed solutions:

1) Will wastewater temperatures drop below 10°C if surface aerators are used in half of the settling lagoon?

2) How will storm water runoff impact the operation of an activated sludge system utilizing half of the existing lagoon?

3) Is adequate alkalinity available?

4) Are the existing final clarifiers adequate for an activated sludge system designed to nitrify?

If the modifications proposed for the interim solution are implemented and it is then discovered that the permanent

modifications are required, the only interim items which will not be incorporated into the permanent solution are the floating baffle wall and small amounts of piping and electrical.

It is recommended that the interim solution be implemented and operated at least through one winter to resolve the previous questions and to determine if the permanent modifications are required. If the interim solution proves capable of meeting the required effluent limitations, the permanent modifications may not be needed.

VIII. COSTS

This section of the report includes project cost estimates for the proposed modifications to the existing waste treatment facilities, as well as annual operation and maintenance cost estimated. Contingency costs are included to cover unknowns in construction caused by problems discovered during construction and are not assumed to cover rising costs. Included are estimated construction costs for the 1982 construction season; if construction is delayed beyond this time, costs should be increased to allow for inflation.

GWALTNEY OF SMITHFIELD
SMITHFIELD, VIRGINIA

INTERIM WASTE TREATMENT MODIFICATIONS
ESTIMATED CONSTRUCTION COSTS

1.	New Anaerobic Effluent Control Structure	$ 6,000
2.	New Pipeline from Existing Anaerobic Lagoon No. 1 to the New Aerated Cell	10,000
3.	Floating Baffle Wall for Segregating the Aerated Cell	15,000
4.	Relocate Nine 25-Hp Floating Surface Aerators to New Aerated Cell with New Anchor Cables	5,000
5.	Slope Protection	4,000
6.	New Return Activated Sludge Line and Sludge Wasting Valves	7,000
7.	Sitework (reseeding areas disturbed by construction)	1,000
	Total	$48,000
	Contingencies	5,000
	TOTAL ESTIMATED CONSTRUCTION COST WITHOUT ELECTRICAL	$53,000

ADDITIONAL ANNUAL OPERATION AND MAINTENANCE COST

1.	Labor - One Additional Laboratory Person at a Salary of $14,000/Year	$17,500
2.	Maintenance	0
3.	Electrical	0
	ESTIMATED TOTAL	$17,500

GWALTNEY OF SMITHFIELD
SMITHFIELD, VIRGINIA

PERMANENT WASTE TREATMENT MODIFICATIONS
ESTIMATED CONSTRUCTION COSTS

1. Anaerobic Effluent Pumping Station Utilizing Existing Gorman Rupp Pumps	$ 15,000
2. Aeration Basin Splitter Structure	7,000
3. Aeration Basins (2)	165,000
4. Aeration System and Centrifugal Blowers	155,000
5. Blower Building	22,500
6. New Clarifier Splitter Structure	7,000
7. Piping, Valves and Manholes	70,000
8. Sitework (Sidewalks, Gravel Roads and Seeding)	12,000
9. Electrical and Mechanical	30,000
Total	$423,500
Contingencies	42,500
Total Estimated Construction Cost	$466,000
Engineering, Surveying and Soils Analyses	40,000
TOTAL ESTIMATED PROJECT COST	$506,000

REDUCED ANNUAL OPERATION AND
MAINTENANCE COST

1. Labor - One Additional Laboratory Person at a Salary of $14,000/Year	$ 17,500
2. Maintenance - Probably Less than at Present	—
3. Electrical - 75 Hp Less Due to More Efficient Seration System @ 4¢/kwhr	—26,300
ESTIMATED SAVINGS	$ 8,800

EXHIBIT 56

[LOGO] Telex 82-3648

Smithfield Packing Company, Inc.
P.O. Box 447
Smithfield, Virginia 23430
(804) 357-4321

August 12, 1982

Mr. Kenneth W. Brown
President
Gwaltney of Smithfield, Ltd.
Smithfield, Virginia 23430

Dear Ken:

After reviewing the Concept Engineering Report by Wells Engineers, Inc., and after extensive discussion with Sharon City, it is my opinion that you should take the advice of the proposal and put into action an interim solution proposed by Wells. Gwaltney's wastewater facility in its existing state is severely experiencing TKN problems in the cooler months and intermitten suspended solids problems. The State Water Control Board Compliance Division has indicated that steps must be taken to solve these problems. It is my opinion that unless some action is taken your system will continue to violate permit limitations and you could experience enforcement action from the state compliance group.

I have attached the Wells Engineers bill for the engineering services provided in making the recommendations for you to pay. Also attached is a drawing to supplement your copy of the Wells report.

Sincerely,

/s/ Henry L. Morris
HENRY L. MORRIS
Vice President/Engineering

/eb
cc: JWL

EXHIBIT 57

[LOGO]

GWALTNEY OF SMITHFIELD
Smithfield, Virginia 23430
(804) 357-3131

September 29, 1982

Mr. T. Switzer
State Water Control Board
Pembroke Building #2
Suite 138
Virginia Beach, VA 23462

Dear Mr. Switzer:

As per our discussion on 9/24/82, I am enclosing the detail for alterations to our current treatment system at Gwaltney of Smithfield, LTD. Your office is currently studying the Wells Engineering recommendations for altering the system. However, we wish to make the modifications as outlined in the attached drawings. The changes we propose will accomplish the same goals as outlined by Wells with much less expenditure of time and money.

Wells' Modification

1. Discontinue use of present aerobic lagoon.
2. Divide the current final pond with a floating poly curtain, thus creating two smaller ponds; one anaerobic and one to be aerated.
3. Relocate nine-25 H.P. aerators into new aeration cell.

Gwaltney's Modification

1. Convert present aerobic lagoon to anaerobic.
2. Relocate aerators into current final pond to create aerated lagoon.

3. Install chemical pumps and tanks on clarifiers to improve efficiency.

We feel that the additional anaerobic lagoon will increase denitrification. Also, the reduction in size of the aerated lagoon should decrease B.O.D.'s and help maintain temperature control. The addition of chemicals to the clarifiers will greatly improve reduction of solids content. The current chlorination system has been upgraded with baffles in the mixing tank and an automatic feed system.

We feel that these modifications will allow us to remain within our permit perimeters.

Sincerely yours,

GWALTNEY OF SMITHFIELD, LTD.

/s/ W. H. Voorhies
WALTER H. VOORHIES II
Manager of Quality Control

WHV:lrl

cc: A. Devine
D. Robinson
R. Hogue

EXHIBIT 60

[LOGO]

MEMO:

WELLS ENGINEERS, INC.

To: PBW, JWS

From: WJW

Reference: Gwaltney of Smithfield, Ltd., WE # 820602

Date: August 26, 1982

I received a call from Sharon City stating that they had not received a reply to the study and report on the referenced project from the State of Virginia.

She went on to say that the president of Gwaltney of Smithfield, Ltd. has made the decision to make the waste treatment operation of Gwaltney of Smithfield totally independent from Smithfield Packing Company. They have purchased equipment to set up their own waste treatment laboratory and have hired a new Class II operator and they do not wish to have Sharon City involved in the operation of their plant any longer. Further, they do not plan to implement the recommendations outlined in our report and believe that they can handle the problems themselves without any help.

Sharon told them that the high TKN values were the big problem and no amount of chemical addition will solve that problem. They plan to add alum to control the suspended solids problem and the high chlorine demand problem.

Ultimately, Mr. Luter may end up deciding not to go along with their desire to run an independent waste treatment operation if the State of Virginia assesses fines and penalties for noncompliance due to high TKN values.

Sharon City's boss, Henry Morris said he told Gwaltney of Smithfield to look very carefully at our report. His

recommendation is that they implement the temporary alternative as the most cost effective way of dealing with the high algae problem and high TKN problem

Ultimately Mr. Luter will have to decide what to do about the waste treatment system at Gwaltney of Smithfield based upon the reaction of the State of Virginia concerning our report and concerning fines if there are TKN violations, which there most assuredly will be in the winter.

In the meantime, Sharon City is training their new Class II operator to run tests and then she will no longer be involved in that plant.

EXHIBIT 65

[LOGO]

WELLS ENGINEERS, INC.
11237 Chicago Circle
Omaha, Nebraska 68154
(402) 330-0202

February 23, 1983

Re: Gwaltney of Smithfield, Ltd.
WE # 820602 (Contract)

Mr. Henry L. Morris
Smithfield Packing Company
P.O. Box 447
Smithfield, VA 23430

Dear Mr. Morris:

When we conducted the Study and Report on the waste treatment facilities at your Gwaltney of Smithfield, Ltd. plant, we had established in our proposal letter of June 11, 1982 a "Not to Exceed" figure of $5,000.00, which was over and above the initial $650.00 that you agreed to pay for my trip on June 10, 1982. The Study and Report actually cost $3,371.95, which along with the $650 for the trip made a total of $4,021.95. We billed you for this amount and received payment in full.

Following completion of our Study and Report, we were informed that the personnel at the Gwaltney plant intended to pursue their own course of action on the waste treatment system, and we did not do any further work on the project until we were notified by you that the Virginia Water Pollution Control Board (in their letter of November 12, 1982) declined to accept the alternatives suggested by the Gwaltney personnel.

We were then requested by you to develop a schedule and a Plan of Action for you to submit to the Virginia Water Pollution Control Board in accordance with their letter of November 12, 1982. This schedule and Plan of Action was transmitted to you on November 23, 1982.

On December 1, 1982 we received a call from Sharon City stating that you had contacted the State of Virginia Water Pollution Control Board, who told you that they felt our suggested schedule was a reasonable one, and that official word would be received following the meeting of the Virginia Water Pollution Control Board. At that time we were requested to proceed with the development of final plans and specifications. We then transmitted two preliminary copies of those plans and specifications and requested additional surveying information on December 23, 1982. We subsequently transmitted three sets of plans and specifications to the Virginia State Water Control Board on January 5, 1983 and have now received a reply letter from them dated February 18, 1983. We are currently in the process of responding to their letter. Our Schedule of Compliance anticipated that we would receive approval of the State Water Control Board by January 31, 1983. We were approximately 6 days late in transmitting plans to them, and they are approximately two weeks late in replying to the plans that were submitted. The schedule called for opening bids on February 25, 1983. We will not likely be able to open bids before March 25, 1983, assuming a speedy resolution of the remaining problems.

Enclosed is a billing for the work we have completed on the development of plans and specifications for this project through January 31, 1983.

Very truly yours,

WELLS ENGINEERS, INC.

/s/ W. James Wells, Jr.
W. JAMES WELLS, JR., P.E.
President

WJW:jlk
Encl.

EXHIBIT 77

[LOGO]
SMITHFIELD FOODS, INC.
P.O. Box 447
Smithfield, Virginia 23430

(804) 357-4321

March 15, 1984

Mr. Richard N. Burton
Executive Director
State Water Control Board
P.O. Box 11143
Richmond, Virginia 23230

Dear Mr. Burton:

I received your letter by certified mail expressing your concern over the TKN violations at the Gwaltney of Smithfield, Ltd. facility since September of 1983. In your letter you explained a brief history of the problems at Gwaltney and I would like to make some corrections regarding the comments.

I have attached a Chronology of Events that was furnished to me by Henry L. Morris, Vice President/ Engineering, who is responsible for the wastewater systems at both plants. This chronology of events is backed up by written correspondence from both Henry Morris and the SWCB. I am particularly concerned that while we submitted our plans and specifications on January 5, 1983 to modify the system, it took the SWCB until the end of May to approve our plans. I might also note that Mr. R.V. Davis, the Executive Director of the SWCB, in 1982, was in agreement with Wells Engineers report proposed in August of 1982, and which was the basis for the plans and specifications submitted in January 5, 1983. We were prepared at the time to react very quickly to the TKN problems but it took five months to

go through the approval procedure even though the SWCB was aware of our plans in August 1982.

Because of the length of time to obtain approval, the bids received to modify the system in January 1983 had to be resubmitted and verified prior to the beginning of construction. As you can see by the attachment, the contract was awarded on June 17, 1983 and construction began July 6, 1983. Further, only 2½ weeks were lost during construction due to obstacles that were not detailed on any of the Gwaltney prints. We found ourselves in a difficult situation throughout November 1983 with the Smithfield Packing Company lagoon system and the need to remove the sludge from their anaerobic lagoons. We requested permission from SWCB to pump the sludge to the abandoned lagoon in the Gwaltney system knowing that the overflow would go through the Gwaltney wastewater system. The SWCB concurred with our suggestion and we bagan pumping sludge on November 16. We found we had to control pumping levels so as not to overload the Gwaltney system with runoff from the abandoned Gwaltney lagoon and we metered the pumping rate accordingly. After pumping of the sludge was completed, we found we still had higher than expected levels in our new anaerobic and aeration lagoons and we requested Wells Engineers assist us in determining the reasons. We found that while we were solving one problem we created another. We found several restrictions in some non-essential piping in the effluent piping which created level control problems in our new lagoon. The restrictions in the non-essential piping were removed, and as you can see, from mid-December on we have showed a steady decrease and on February 8 our last TKN violation occurred.

Further, our TKN monthly average was below the allowable average during the month of February and to this date we have experienced no violations of our permit for the month of March.

We feel we have fulfilled our obligations as we first stated in October 28, 1982 to address the problems and expediently correct the problem. The SWCB in examining our proposal delayed the overall construction and completion by approximately five months. We feel the action of the staff in threatening legal action before the Board Members of the SWCB is inappropriate. The facility is in compliance with its NPDES permit, and according to Wells Engineers and our staff people, is functioning as intended and our effluent treatment is improving daily.

Sincerely yours,

/s/ Joseph W. Luter
JOSEPH W. LUTER, III
Chairman of the Board

/eb

cc: Tidewater Regional Office, SWCB
Bureau of Applied Technology, SWCB
Bureau of Enforcement, SWCB
Attorney General, Gerald L. Baliles
Attorney-at-Law, H. Woodrow Crook, Jr.

CHRONOLOGY OF EVENTS CONCERNING WASTE WATER PROBLEMS AT GWALTNEY OF SMITHFIELD, LTD.

October 28, 1982 — I wrote a letter to R. V. Davis stating changes in the management structure at Gwaltney and accepting responsibility for the wastewater system and the corrective actions that would follow based on a report submitted by Wells Engineers in the Spring of 1982.

November 12, 1982 — I received a letter from R. V. Davis asking for a plan of action by November 30th and questions about our approach to resolve the problems.

November 30, 1982 — I responded with a letter to Mr. Davis with compliance schedule as follows:

1. submitting plans and specs to SWCB by 12/30/82
2. expected approval from SWCB by 1/31/83
3. opened bids 2/25/83
4. awarded contract and started construction 3/1/83
5. complete construction and start-up plant 4/15/83
6. achieve compliance 5/27/83
7. evaluate performance of system for the year end 6/22/84.

January 5, 1983 — Plans and specifications submitted to SWCB.

February 18, 1983 — Letter from SWCB requesting answers to four questions concerning the plans submitted.

March 2, 1983	Submitted a detailed answer to each of the four questions requested by the SWCB.
March 10, 1983	We received another letter requesting further information about our plan.
March 31, 1983	We submitted answers to three questions complete with calculations showing the basis of our design.
April 27, 1983	We received a letter from the State indicating forthcoming approval but also requesting comparative data on nitrification from a similar packing plant and a new schedule of compliance by May 31, 1983.
May 13, 1983	We submitted data from (3) comparative packing plants and a new schedule of compliance as follows: 1. Start construction 10 days after approval 2. Complete construction 65 days after starting 3. Achieve compliance 45 days after completion
May 31, 1983	The State wrote a letter approving the modifications to the Gwaltney waste treatment system. This letter was received on June 3, 1983 by Sharon City but due to my absence was not officially received until June 10, 1983.
June 17, 1983	Contract was awarded.
July 6, 1983	Construction began (the reason for the delay was because we had to firm-up prices submitted on the previous quotations due to delays in approval of the system modifications by the SWCB).

October 18, 1983	Construction complete-2½ weeks lost during construction due to obstacles located underground as the piping for the lagoon system was being laid. This was detailed to Anne Field in a letter dated September 19, 1983.
November 16, 1983	Begin pumping sludge from Smithfield Packing lagoon system to abandoned anaerobic lagoons at Gwaltney.
November 18, 1983	We reduced pumping levels due to rising levels in abandoned lagoons forcing additional flow to the modified system.
December 1, 1983	Fabricated and installed slide gate to control flow from the old aeration lagoon.
December 4, 1983	Slide gate working well, levels begin dropping.
December 7, 1983	Experienced extremely heavy rains creating high levels in the lagoon system and upsetting the modified anaerobic and aeration basins.
December 8, 1983	Wells Engineers evaluated the system and found restrictions in non-essential piping in the effluent discharge which were magnifying problems with level control in the new anaerobic and aeration basins.
December 11, 1983	Non-essential piping was removed from the system.
December 15, 1983	Level of new aeration basin steadily dropping, solids building, TKN dropping.
December 31, 1983	System began functioning as intended with the design by Wells Engineers. Solids were building to around 3,000 Mg/*l* in the aeration lagoon and the cover on the anaerobic lagoon was beginning to build.

TKN violations since 12/01/83 (permit limit 219 Kg/d) (109.1 Kg/day average/month) :

12/01/83	385.06
12/06	296.28
12/07	407.78
12/08	380.51
12/13	397.91
12/14	560.18
12/15	441.11
12/19	539.66
12/20	573.03
12/21	580.56
12/27	369.02
12/28	466.75
12/29	469.12
1/04/84	489.97
1/05	461.78
1/06	445.16
1/09	375.36
1/10	310.46
1/11	330.80
1/17	342.38
1/23	248.65
1/24	240.18
2/08	233.7

The last TKN violation was 2/08/84. February monthly average was 103.8 Kg/day, which is below the allowable average of 109 Kg/day. This system's grease bearing anaerobic lagoon is developing a grease cover and the system is beginning to function as intended with satisfactory effluent falling within the limits of our NPDES permit.

EXHIBIT 101

STATE WATER CONTROL BOARD

STAFF REPORT

IN RE:

GWALTNEY OF SMITHFIELD, INC.

March 25-26, 1984

General Assembly Building
Senate Room B
Richmond, Virginia

MR. ARIAIL Next item, Mr. Burton

MR. BURTON The next item Mr. Chairman, is Gwaltney of Smithfield, Inc., a staff report by Larry McBride.

MR. McBRIDE Mr. Chairman, this will be a staff report for the purpose of briefing the Board on certain problems which Gwaltney of Smithfield has had in meeting conditions of their NPDES permit. Mr. Terry Switzer, an Engineer from my staff will be presenting the staff presentation. I believe the Vice-President of Engineering with Gwaltney of Smithfield, Mr. Henry Morris, is also with us today and I think he wishes to address the Board on the subject following Mr. Switzer. Terry.

AFTER BEING DULY SWORN

MR. ARIAIL Why are we swearing in on this one?

MR. McEACHERN On advise from Mr. Butcher.

MR. BUTCHER This is essentially a 15 day appearance, Mr. Chairman.

MR. ARIAIL O.K.

MR. SWITZER Mr. Chairman, Members of the Board, Gwaltney of Smithfield, Ltd. is a swine slaughtering and processing operation located in Smithfield, Virginia. Wastewater is treated on-site and discharged at an average rate of about 1 mgd to the Pagan River under an NPDES permit which was originally issued in October, 1974. The company, previously named ITT Gwaltney, was sold to Smithfield Foods in October, 1982. This viewgraph summarizes the sequence of events which this report will discuss. TKN limitations were included in the company's permit in August of 1980 due to dissolved oxygen concerns in the Pagan River. Violations of the TKN limit occurred yearly during cold weather, and the company was requested to submit plans for upgrading to achieve TKN compliance. In August, 1982, the company's consultant submitted preliminary plans. However, the company modified those plans to reduce the

costs, and the staff felt that the modified plans were not satisfactory. Then in October, 1982 the company was purchased by Smithfield Foods, and the new management approved the consultants original preliminary design. A proposed schedule of compliance was submitted in November of 1982 which included a May 27, 1983 date for permit compliance. Final plans were received in January of 1983. After all questions pertaining to the plans had been satisfactorily addressed, final approval was granted on May 31, with a request for a revised schedule of compliance and monthly progress reports. This revised schedule called for permit compliance by October 8, 1983. By August, the staff had not received any of the requested progress reports, and a letter was sent from the Bureau of Enforcement reminding the company of the request for the reports and of the need to adhere to the schedule of compliance. A progress report was submitted at the end of August, and it was noted that the company was in violation of the construction completion date of August 24th contained in the schedule. The company reported that the delay had been due to problems with awarding a contract and several additional construction related delays. The new completion date was projected to October 5. No further progress reports were submitted, and the modifications were completed on October, 1983. Unfortunately, just as Gwaltney's newly modified treatment system was being brought on line, problems developed in the system as a result of activities in progress at the Smithfield Packing Co., owned by the same company as Gwaltney and located across the street. Smithfield Packing Co. had been experiencing major problems with its treatment system, and was involved in a remedial program to correct the problems. This remedial program involved pumping sludge from the Smithfield's Packing Company's treatment facility to an abandoned anaerobic lagoon at Gwaltney, and for the resulting excess liquid to be bled slowly through the modified treatment system. While this was in progress,

a period of heavy rainfall occurred. No flow control capability had been initially been installed within the Gwaltney system to control flows between the abandoned lagoons and the newly modified system. Gwaltney's effluent pumps could not handle the added flows from both Smithfield Packing Co. and the rainfall. Water levels rose throughout the Gwaltney system, causing hydraulic overloading and continued violations since December, 1983 when the new system was brought on-line. Unfortunately, the sludge pumping operation continued through this period, adding to the hydraulic load. Therefore, despite the company's schedule calling for compliance in October, 1983, the facility continued to be in violations of its permit. This chart shows the TKN levels discharged by Gwaltney since the inclusion of these limitations in their permit. The blue areas represent the average monthly TKN levels, the red areas the maximum daily TKN levels. The upper dashed line in the maximum daily limit included in the permit. The lower dashed line the average monthly limit included in the permit. It should be noted that the TKN violations at Gwaltney have generally occurred during the cold temperature months of November through April, when nitrification is generally reduced. During these months dissolved oxygen levels in the stream are not critical, and the impact on the stream would not be major. This is in contrast to the situation at the Smithfield Packing Co., where TKN violations have continued through the summer months when stream D.O. is critical. A Virginia Institute of Marine Science model was recently run on the Pagan River, and the results substantiated that the winter dissolved oxygen levels should not be adversely affected by the elevated TKN levels. Moreover, the discharge levels are now returning to within compliance levels and the staff feels confident that the new treatment system will be able to maintain permit compliance. As shown in the viewgraph, the average monthly TKN level in February was within the permitted limit and

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the maximum violation resulted from only 1 sample in excess of the permitted maximum daily limit. The NPDES permit for Gwaltney is due for reissuance this October, and the most current information available at that time will be incorporated into the reissued permit. Most recently, the Chesapeake Bay Foundation and the NRDC have notified Gwaltney that they intend to jointly file suit in accordance with Section 505 of the Clean Water Act for violations of their NPDES permit as previously described. Since the staff has been unsuccessful for such a long period of time in our efforts to bring this facility into compliance, and in view of the legal action by the environmental groups, the staff wished to bring this matter to the attention of the Board. That concludes the presentation, if the Board has any questions, I'd be happy to answer those.

MR. ARIAIL Let me make sure, most of the presentation you made didn't, that had to do with different violations, didn't it?

MR. SWITZER No, this was all based on TKN violations only.

MR. ARIAIL Those flows that were coming from the adjoining plant?

MR. SWITZER Those flows resulted from sludge being pumped from Smithfield Packing Co., into an abandoned lagoon at Gwaltney. As the sludge entered the lagoon, the liquid level above it rose and was to be bled slowly through the remaining system.

MR. ARIAIL That's not happening anymore?

MR. SWITZER That was a temporary occurrance. Smithfield Packing Co. needed to eliminate the accumulated sludge in one of their lagoons, and . . .

MR. ARIAIL Aren't we proceeding to get Smithfield, or isn't that . . .

MR. SWITZER Well, right, well that was a different problem.

MR. ARIAIL Are we treating that as being Smithfield's problem?

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MR. SWITZER Well, it's the same company.

MR. ARIAIL I know, but, have we taken any enforcement action for that, or is that part of this?

MR. SWITZER Not for the sludge pumping operation, we haven't.

MR. ABBITT We do have enforcement action against Smithfield though, don't we John?

MR. BUTCHER Mr. Chairman, yes we are in court with Smithfield at the present time.

MR. ARIAIL But, it is not that particular . . .

MR. BUTCHER No, the action against Smithfield is directed toward Smithfield's own discharges from his plant and has not been amended to include this incident.

MR. ARIAIL Well I understand that what we are saying now, is, what I believe you said is that these TKN standards are likely not to be included in the permit when it is reissued?

MR. SWITZER No, when the permit is reissued in October, we intend to use whatever the latest information we have on the various modeling efforts at that time to develop the proper type of permit to be reissued. Whether it includes limits changes or additional monitoring, that has yet to be determined.

MR. STANDING Are you saying, to put things in the proper perspective, that the TKN limitations in their permit are not necessary to protect the water quality and because if it is a violation shown to those TKN's in the permit, it's triggered bells with other organizations, saying they are in violation of their permit so we are going to sue Smithfield, when in fact there is no water quality damage?

MR. SWITZER No, what we are saying is that during the winter months, we don't believe that the violations that Gwaltney has been experiencing have adversely effected the water quality because during the winter dissolved oxygen in the river isn't critical, and the dissolved oxygen concerns are the reason the TKN limits were put into the permit. Now, had the violations

occurred during the summer, that would be a critical D.O. period and would probably have adversely effected the water quality.

MR. STANDING So, the plan is to revise those TKN limits in the new permit that will be issued in October?

MR. SWITZER Those limits will be looked at closely, and some type of revision will probably be necessary.

MR. ARIAIL O.K., anymore questions of Mr. Switzer? We want to hear from, is there a representative of the Company here?

MR. SWITZER Yes sir.

MR. MORRIS Mr. Chairman, Members of the Board, by name is Henry Morris, I am Vice-President of Engineering for Smithfield Foods. Smithfield Foods is the parent company for Smithfield Packing Company, the packing company located on the left side of the screen and Gwaltney of Smithfield, the packing company located on the right side of the stream. Both of these plants are located in Smithfield, Virginia. I would like to clarify some of the things that Mr. Terry Switzer said, because I think that there are some errors in his presentation. 1) We acquired Gwaltney from the ITT organization in October of 1981. We elected to maintain the ITT management staff for approximately a year, and there were many changes that we made at that, in the management staff during the first year. At the time that we acquired Gwaltney we found that we were in violation of the TKN limits with the Gwaltney wastewater system. In the spring we acquired Wells Engineering out of Omaha, Nebraska to study the Gwaltney system and make a presentation, which they did, in fact as Terry Switzer said, in August of 1982. I assumed responsibility for the engineering aspects of the Gwaltney operation in October of 1982 and found that prior management had elected to present a plan different from Wells Engineering to the State Water Control Board. As you can see on the chronology of events that occurred from that point on. I contacted Mr. Davis, who was then

the Executive Director of the State Water Control Board, assured him that the management structure at the Gwaltney organization would respond promptly to the problem of TKN, which in fact we did. We submitted a schedule per his request by the first of the year, which was almost verbatim the plan that Wells' Engineering staff had proposed. We proceeded at the time to obtain bids and begin our plans for construction. By looking at the chronology of events, you can see that from January the 5th, over on the second page, until May the 31st we received numerous questions from the State Water Control Board concerning the, our plan for implementing a modification to the Gwaltney system and also some of the calculations that were behind the proposal prior to the time the award, the approval was given. We in fact received the approval on May 31st. I was out of the country at the time we received the approval and I reacted when I returned, on June 10th. This is a picture of the Gwaltney wastewater system as construction was beginning. The Gwaltney system consisted of an anaerobic lagoon in the center of the picture, the lagoon with the cover. A large aeriation basin, the basin directly behind the white warehouse building with the division in the middle of the lagoon was a stabilization pond within the system, and then in the very bottom right hand corner you can see one of the two twin clarifiers. The Wells Engineering report in essence called for a re-structuring of this lagoon system, that we would totally eliminate the large aeriation basin that is directly in the center of the picture where you can see the aeriation activity. Modify the stabilization pond on the right hand side of the picture, so that we had increased anaerobic capacity and a very small aeriation basin. We in essence installed an activated sludge system very similar to the one we have next door in Smithfield Packing Co. This picture is, was taken sometime in the summer and construction had begun. One of the problems we had early on was all of the bids that we received back in

January and February months had to be updated because of the length of time it took for the State Water Control Board to approve the plan. Once the bids were received and renewed, the contract was awarded and we actually began construction on July 6, 1983. During the construction period we lost approximately 2½ weeks, which I thought was remarkable for a project of this size. Most of the lost time was due to pipelines that we were running to and from the plant and obstacles that we hit underground that weren't marked on any print. This is a facility that has been added onto, I guess many times, in the last several years and most of the drawings of the internal part of the plant and the plumbing are not on paper. We hit obstacle one after the other and it did create some delays for us, but we moved right along and completed the construction of the lagoon system and actually effective startup on October 18, 1983. Mr. Switzer has said that we had a problem with Smithfield Packing anaerobic lagoons and pumped our sludge from those lagoons to this system. As the system, I'm going to move over to the slide to show you a couple of things. We had an abandoned anaerobic lagoon on the back side of the aeriation basin that would overflow to another abandoned lagoon which would ultimately overflow to this aeriation basin. We took the piping from across the road, across this roadway, down to this anaerobic lagoon to pump the sludge out of the two anaerobics at Smithfield Packing that were virtually of a dialated sludge. We began pumping the sludge on November 16, we reduced the flows from the Smithfield Packing Co. on November 18, when we found that the water level in the old aeriation basin was rising rapidly and we were completed with the pumping of the sludge from the 2 anaerobic lagoons by November 24, 1983. The short period of time that we were pumping really didn't impact the system that much. What we had really done was that we had solved one problem and created another. We found many, in the piping arrangement

from the pumping station in the new aeriation basin to the chlorine contact tank and ultimately to the Pagan River, we found an awful lot of restrictions in that piping and a lot of the piping was non essential. You couple that with the flow from the plant, some very heavy rainfall in the period, the latter part of November and the first part of December and we were hydraulically overloaded. We modified the piping on the discharge side of the lagoon system to the river. We were immediately successful, as far as our pumping and our levels in our lagoons reduced, and as you can see on the last page of this chronology of events, I've listed our TKN violations from December 1—present. If you will look down about December 19th, you will see that we had a 539 kg/d violation, but if you will look at the pattern following that 19th of December you will see a drastic drop through the winter months, when our violations have occurred in the past years, of the TKN violations down to a point of February 8th, which was 233 kg/d, our permit limit being 219. Since that time, we have had no violations of TKN and the system is developing a grease cover over the anaerobic lagoon. The aeriation system is working as it was designed. I believe we have eliminated the TKN as a problem with the Gwaltney system. I don't think any of these other slides are really particularly pertinent to the issue. I included one slide that would show you the proximity of the Pagan River from the lagoon system. As Terry Switzer indicated, the mathematical model that was performed on the Pagan River in the mid-seventies has been restudied. We had a meeting this past Thursday with the State Water Control Board. We are in hopes that some relaxing of the TKN standards through the winter months would be possible, since the state has indicated that the impact to the Pagan River is virtually non-existant during the winter months. I'll be happy to answer any questions, if the Board has any.

MR. ARIAIL Are you saying that you think when it starts running though you would be able to meet the TKN standards that we've got now?

MR. MORRIS The design by Wells Engineering was to meet a TKN limit, maximum of 219 kg/d, 109 kg/d monthly average.

MR. ARIAIL What would the, if the permit ended up being modified to give you higher limits during the winter months, would that just give you extra capacity or would it reduce what your treatment had to be at some point?

MR. MORRIS Let me try to answer that question in a little different fashion. The hardest time for a treatment system of this type to control TKN is through the winter months of the cold temperature. As the water temperature reduces down to a point of about 50°F, the TKN limit can jump immediately as the water may fluctuate in 2-3°. With the large surface areas we had on the aeriation basin before, it was very easy for that aeriation basin to drop in temperature as the outside temperature did. With the new smaller aeriation basin, we hope that we can maintain the temperature in that the average water temperature of a meat packing plant, the effluent is rather high because of, just because of the nature of the operation. We don't have much control over the weather, we don't have any control over a duration of a real hard cold spell and I can see, there could be some violations if we got into some very severe temperature problems. It's our hope and certainly the best expertise we have says that we should be within limits, that we should meet the limitations. I just project our concerns as far as our inability to control the weather with this particular type of system.

MR. ARIAIL Any other, any questions?

MR. MILLER Just one question Mr. Chairman. Have you completed all the transfer of the sludge from the other plant?

MR. MORRIS Oh yes sir. We completed the pumping of the sludge from the two anaerobic lagoons on November 24th, Thanksgiving Day, this past year. We then moved over and pumped the sludge out of an old sludge holding pond that had been eliminated from the system. Our new plan at Smithfield Packing, calls for us to utilize that small holding pond as an aeriation basin and we had to eliminate all of the sludge from the pond before we began work on the system. But, we completed the pumping of that sludge, and we pumped it at a very slow rate and we were able to hold the water levels down, primarily because of the modifications we made to the piping between the pumps and the Pagan River. We were able to hold that pumping down and get it pumped sometime I think around the 1st of January.

MR. ARIAIL Any other questions, comments? Thank you very much.

MR. MORRIS Yes sir.

MR. McBRIDE Mr. Chairman, the staff would simply recommend in this case that you accept this status report and direct the staff to consider the updated results of the mathematical modeling in the reissuance of the NPDES Permit for this facility.

MR. ARIAIL I see Mr. Watson's here from the Chesapeake Bay Foundation, I don't want to put you on the spot, I'd be interested in knowing why ya'll are thinking about suing when it seems to me, we may incline toward not taking any action for past violations, from what I've heard. Let's see if I'm missing something.

MR. WATSON I didn't come prepared to make a statement, but I'll be glad to answer your question.

MR. ARIAIL I understand, was this just a routine filing, are ya'll going through routinely filing these notices, or was there some particular reason that ya'll filed a notice in this particular situation?

MR. WATSON No, we routinely follow the enforcement of NPDES permits, but this is by no means a routine action on our part. In examination of the industrial

major dischargers in the State of Virginia for the past 5 years or so, this is one of the worse enforcement records we have seen. Smithfield Packing, the other company, also has a very bad record and I think that possibly at looking at the two in comparison you are not giving quite as much consideration to this case as would be warranted under the circumstances. As you know, enforcement of NPDES permits is a problem nationwide and I think it's a problem in Virginia too, if this type of record goes by with no more enforcement than has occurred on it to this date.

MR. ARIAIL Ordinarily I'm inclined to agree that there is a problem, but it seems to me we've got action against Smithfield, I'm not trying to argue, I just really trying to understand because I'm inclined personally not to take any action in this case, and before we do things like that I like to hear the other side a little bit. Whatever we do, obviously ya'll can go ahead with your law suit, but that's a much more cumbersome way of dealing with the problem. We're going ahead with Smithfield, we have some violations with Smithfield, but they were in court, is that correct?

MR. BUTCHER We're in court with Smithfield, Mr. Chairman, they're under a temporary injunction and the penalty case is going forward into discovery right now.

MR. ARIAIL So, we really are just dealing with this issue alone, we've got separate action against Smithfield, so we recognize that they may have had other corporate problems. O.K., any other, I don't really mean to, I'm not trying to argue with you, I just wanted to hear from ya'll. Anybody have any questions from Mr. Watson? Thank you. Do we need to go into Executive Session on this or do I hear a motion for the staff recommendation.

MR. STANDING I move we adopt the staff recommendations.

MR. CRAGWALL Second.

MR. MILLER Will the staff come back in June with the response . . .

MR. ARIAIL What does that mean if we adopt the staff recommendations?

MR. McBRIDE Mr. Chairman, the reissuance of the company's NPDES permit is scheduled for October, so we could give you a status report in June, possibly by then we will have resolved the question of the application of the TKN limits during winter vs. summer months. But, it would not be until October that we reissue that permit.

MR. ARIAIL But, the violations at the moment, as I see the evidence, it seems to me that they are under control.

MR. McBRIDE I believe that's true, and another thing that you should recognize. A major difference between the way we are handling this action vs. the Smithfield Packing Co., although the Smithfield Packing Co. violated TKN and Gwaltney is also violating TKN. The big difference is when. Smithfield Packing's violations occurred during the summer and we had evidence that there were dissolved oxygen problems in the river, which we felt were related to those. In this case the violations have largely been during the winter months and we have no evidence of water quality problems. You are right, they are now under control.

MR. ARIAIL It just doesn't seem to me that it accomplishes anything from my point of view to take enforcement action for violations of standards that seem to have been not necessary at the outset. Now, that may be hindsight, but that's . . . anybody else have any comments, any further discussion on the motion? All those in favor of the motion, signify by saying "Aye", opposed.

UNANIMOUS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, INC., and
NATURAL RESOURCES DEFENSE,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS STATED FROM THE BENCH

BEFORE: Honorable Robert R. Merhige, Jr.
United States District Judge

Richmond, Virginia
August 28, 1984

THE COURT: This is a motion by plaintiffs for partial summary judgment, on the issue of liability, in a "citizens' suit" to enforce certain requirements of the Clean Water Act, 33 U.S.C. §§ 1311 *et seq.* (the Act), against a food-processing facility. No effort was made to set up a factual issue that was not present; there are no factual issues here. The matter is ripe for summary judgment.

The first of two plaintiffs here, Chesapeake Bay Foundation, is a non-profit organization organized under the laws of Maryland. Its principal place of business is in

Annapolis, and it has an office in Richmond. It is a regional conservation organization with thousands of members in the Chesapeake Bay area. Some of its members reside in Virginia in the vicinity of the Pagan River, and they use and enjoy the river and the water system. (All this is set forth in plaintiffs' uncontested affidavits.)

The Court finds that the quality of the nation's waters and waters of the Commonwealth directly affects the health, recreation and esthetic environmental interests of that organization and its members.

The Court finds that the interests of that organization and its members have been, are being, and will be adversely affected by the failure of defendant, Gwaltney of Smithfield Limited (Gwaltney), to comply with its National Pollution Discharge Elimination System (NPDES) permit.

The second plaintiff, Natural Resources Defense Council, is a non-profit membership organization organized under the laws of the State of New York with offices in New York, Washington and San Francisco. It has over seven hundred individual members within the Commonwealth of Virginia. They, like the members of the Chesapeake Bay Foundation, utilize the river and are affected by Gwaltney's failure to comply with its NPDES permit. (This too is by uncontested affidavit).

Jurisdiction in the case is pursuant to 33 U.S.C. § 1365(a)(1); the Court finds from the uncontradicted evidence that on October 23, 1974 the Virginia State Water Control Board issued, to the defendant, NPDES Permit Number VA 0002844, pursuant to VA. Code Section 62.1-44.15, Section 402 B. of the ACT, and an approval of Virginia's program by the Administrator of the United States Environmental Protection Agency under Section 402 of the Act, 33 U.S.C. § 1343, dated March 31, 1975.

The permit was reissued on October 23, 1979, modified by the addition of a TKN limitation on August 1, 1980, and it has remained in effect to this date.

The defendant's monthly reports under its permit, which are required to be filed, reflect that between January 1979 and June 15, 1984 it has on at least 237 occasions discharged substances into the Pagan River, which is a tributary of the James River and Chesapeake Bay, in excess of the amounts allowed by its permits. Defendants' monthly reports may be used to establish civil liability under the Act. *See, e.g., United States v. Ward*, 448 U.S. 242 (1980).

Under 33 U.S.C. 1311(a), any discharge is unlawful unless it is authorized by one of several specified sections of the Act, including Section 402(b) of the Act, 33 U.S.C. 1342(b). Section 402(b) provides that compliance with the permit issued pursuant to this section shall be deemed compliance with Section 301 of the Act, 33 U.S.C. § 1311, for purposes of enforcement under Section 309 of the Act. 33 U.S.C. § 1319, or under Section 505 of the Act, 33 U.S.C. § 1365.

Without more, then, to violate an NPDES permit condition is to violate the Act. *E.P.A. v. State Water Resource Control Board*, 426 U.S. 200, 205 (1976), *Natural Resources Defense Council v. Costle*, 568 F.2d, 1369, 1374-77 (D.C. Circuit 1977).

There being no genuine issue as to any material facts, the plaintiffs are entitled to summary judgment in the form of a declaration that the defendant has violated the Act, for which it must be held liable. It is so ORDERED.

Gentlemen, we might just as well set it down for whatever else you want to do with it. I will see you in chambers. Thank you for your help.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, INC.

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[Filed Aug. 30, 1984]

ORDER

For the reasons stated from the bench and deeming it proper so to do, it is ADJUDGED and ORDERED as follows:

Defendant's motion to dismiss be and the same is hereby DENIED.

Defendant's motion to abstain be and the same is hereby DENIED.

Plaintiffs' motion for partial summary judgment be and the same is hereby GRANTED, and the Court declares defendant Gwaltney of Smithfield, Ltd. to have violated and to be in violation of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1311 and 1342.

The matter of appropriate remedy and injunctive relief is, upon motion of parties, continued until further order of the Court.

Let the Clerk send a copy of this order to all counsel of record.

/s/ [Illegible]
United States District Judge

Date Aug. 30, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, INC., *et al.*,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[Filed Nov. 16, 1984]

ORDER

After hearing counsel for the parties at a status conference held on the 7th day of November, 1984, it is hereby ADJUDGED and ORDERED as follows:

1. Defendant's Motion for Rehearing is GRANTED, and this Court's Order of August 30, 1984, is AMENDED to provide that the Court declares defendant Gwaltney of Smithfield, Ltd. to have violated the Federal Water Pollution Control Act, 33 U.S.C. §§ 1311 and 1342, on those occasions subsequent to October 27, 1981, that are documented by Discharge Monitoring Reports that it has submitted to the Virginia State Water Control Board.

2. Counsel for the plaintiffs shall serve proposed findings of fact and conclusions of law on counsel for the defendants no later than November 27, 1984, and counsel for the defendant shall serve proposed findings of fact and conclusions of law on counsel for the plaintiffs

no later than December 4, 1984. Counsel for the parties shall thereafter meet and confer in an effort to enter into a comprehensive written stipulation of the facts and the law relevant to the imposition and amount of a civil penalty for the defendant's violations of the Federal Water Pollution Control Act. All stipulations shall be filed with this Court no later than 12:00 noon on December 14, 1984, together with the parties' proposed findings of fact and conclusions of law regarding those issues that cannot be resolved by stipulation.

/s/ [Illegible]
United States District Judge

Date Nov. 16, 1984

Seen and Agreed to:

/s/ Jeter M. Watson
JETER M. WATSON
Chesapeake Bay Foundation, Inc.
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Counsel for Plaintiffs

/s/ Anthony F. Troy
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Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CA-84-0366-R

CHESAPEAKE BAY FOUNDATION, INC.,
Plaintiff,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[TRANSCRIPT OF PROCEEDINGS]

Richmond, Virginia

Before: HONORABLE ROBERT R. MERHIGE, JR.,
United States District Judge

Appearances:

JETER W. WATSON, ESQ.
JAMES THORNTON, ESQ.
ANN P. GAILIS, ESQ.
SCOTT BURNS, ESQ.
For the plaintiff

ANTHONY F. TROY, ESQ.
JAMES E. RYAN, JR., ESQ.
H. WOODROW CROOK, JR., ESQ.
For the defendant

GILBERT FRANK HALASZ, RPR
Official Court Reporter

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[87] Q. Mr. Sneed, would the proposed interim solution and the permanent solution, so called, did you tell the company that both would meet permit compliance?

A. We felt they were both acceptable alternatives that stood a good chance of meeting the limitations, otherwise we would not have proposed them.

Q. Would you describe very quickly for the court the change in the aerators design which has been introduced and how that would improve waste water treatment at the plant?

A. Yes. The original aerators which were in the aerated lagoon originally from I. T. T. Gwaltney which were then moved to the new aerated lagoon do result in fairly large amount of temperature loss, particularly during the winter [88] time. So as those have needed repair or needed replacement they have been replaced with a submerged type of aerator.

Q. Does that minimize heat loss, and does it make it more likely that the plant would comply with its T. K. N. limitations?

A. That is correct.

Q. You have reviewed the waste water characteristic, I take it, that come out of the packing plant. Are you aware—just characterize the waste water for me, if you would, please. Tell me what it is like.

A. Yes, sir, it is a highly biodegradable waste as you would expect from food, that is, coming from pork. It is very readily treatable by the bacteria in the treatment plant by virtue of being a food waste. It is not a toxic type of waste. In fact, we had a number of toxics analyzed and none of them showed any concentrations that would be of concern.

Q. So to your knowledge there is nothing in the waste water that would be toxic, that is of any concern?

A. No, sir.

Other than chlorine, which is required by the State Water Control Board to meet the fecal limitations.

Q. All right. I don't believe I have further questions.

THE COURT: All right.

MR. BURNS: I will try to make it brief. I only have a few questions, a couple areas I want to touch on.

[89] CROSS-EXAMINATION

BY MR. BURNS:

Q. Isn't it in fact, through, that your company advised defendant, I believe you have testified, prior to the purchase of the Gwaitney facility that there were inadequate technology there with regard to meeting T. K. N. limits?

A. Sharron City called our firm when Smithfield Foods was considering buying the plant and briefly described the facility that was there briefly and asked our opinion of it. We did indicate that we felt the lack of sludge return was of concern and noted potentially about our other problems that perhaps should be addressed.

Q. Mr. Sneed, when was the Concept Engineering report designed to address these problems prepared?

A. In June and I believe in July of 1982.

Q. That is some eight or nine months after defendant acquired the Gwaltney plant?

A. I believe that is correct.

Q. With regard to the interim solution prepared in the Concept Engineering report, were there not some reservation with regards to its ability to meet T. K. N. limits in the winter?

A. Yes, sir. We did have some reservations, particularly in light of the surface aerators and temperature loss. However, we had designed a very similar type system, a lagoon [90] system with sheet pile baffle walls at Smithfield Packing Company, and that did give us comfort in that regard.

I might also note, of course, that subsequent use of the submerged aerators to replace the surface aeraters.

Q. You referred a number of times in your testimony to Smithfield plant. You designed that plant?

A. Yes, sir.

Q. Have there been compliance problems there?

A. In the past year or so, yes, there have been.

Q. Wasn't that facility in closed by the State Water Control Board as a result of that non compliance?

A. Yes, sir.

Q. Do you think that given that it was unreasonable for the State to request more information from Gwaltney than was provided by Smithfield?

A. Yes, I do. That system performed very adequately for a number of years after it was designed. Only after the design loads were significantly increased did it go out of compliance.

Q. Mr. Sneed, is adequate grease cover important to proper winter T. K. N. treatment of the plant?

A. On the anaerobic lagoon, yes.

Q. You were with us last week when we toured the facility, were you not?

A. Yes.

[91] Q. Isn't it in fact true at that point in time, in December, the lower anaerobic lagoon did not have adequate grease cover?

A. Yes. Earlier in the summer time that lagoon was covered with grease. And that was what we expected would happen.

Quite frankly we were very surprised that that grease cover has deteriorated to this point, and we have since taken steps to accelerate the formation of that grease cover.

Q. Given the importance, as you mentioned before, of maintaining adequate grease cover, isn't there some doubt in your mind as to whether the Gwaltney facility would be in compliance with T. K. N. limits this winter?

A. Yes, we have.

Q. Isn't there some doubt? That is all I am asking.

A. Yes, sir.

I think there is some doubt every year that you would expect the plant to go out of compliance at some time.

Q. I believe you mentioned earlier that the B.O.D. data biochemical oxygen demand data upon which you relied in developing the Concept Engineering report were within expected limits?

A. Yes, sir.

Q. Isn't that because you chose to disregard the higher B.O.D. numbers reported on two to three days tested?

[92] A. We did disregard the higher B.O.D. and suspended solids numbers on those days because the comparison of those parameters with the T. K. N. and the grease indicated there was probably a grease spill which skewed those numbers. The one remaining sample which we did choose to believe is within norm of what we would expect from this type of plant.

Q. You stated earlier, did you not, there were at least some reservation in your mind with regard to the inability of the interim solution to meet T. K. N. limits in the winter.

A. Yes, sir.

Q. Defendant didn't at first even chose to implement the interim solution, did they?

A. There was another proposal which was submitted by the personnel of I. T. T. Gwaltney after our Concept Engineering report was prepared.

Q. That report or proposal was submitted in the late summer of 1982, was it not?

A. I believe that is correct.

Q. Did your company express an opinion with regard to the proposed modifications of your interim solution?

A. Regarding our proposed modification?

Q. No. Did your company express an opinion with regard to the modification proposed by Gwaltney when they decided not to follow your interim solution?

A. Yes, sir, I believe we expressed doubt that the [93] proposed—the I. T. T. Gwaltney proposal would meet the limitations.

Q. Do you have an exhibit book?

A. I don't have one in front of me.

Q. Exhibit 60, please.

Can you identify that document for the record, please?

A. This is a memo which was written by Jim Wells, president of our company, to Paula Wells and myself regarding the Gwaltney packing plant.

Q. Could you please read the last paragraph of that memo to the court?

A. "In the meantime, Sharron City is training a new class of operators to run tests."

Q. Next to the last paragraph, pardon me a minute.

A. "Ultimately Mr. Luter will have to decide what to do with waste treatment at Gwaltney Smithfield based upon the reaction of the State of Virginia concerning our report and concerning fines if there are T. K. N. violations, which there most assuredly will be in the winter."

Q. That was with regard to the proposed modifications of Gwaltney to interim solution, was it not?

A. Yes, sir.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, INC.

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[Filed May 16, 1985]

MOTION TO DISMISS
FOR LACK OF JURISDICTION

Defendant Gwaltney of Smithfield, Ltd. respectfully moves the Court to dismiss this action for lack of jurisdiction over the subject matter, for the reasons stated in the accompanying Memorandum.

GWALTNEY OF SMITHFIELD, LTD.

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[Certificate of Service Omitted in Printing]

[*Corrected Copy*]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, *et al.*,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[Filed June 26, 1985]

MEMORANDUM

Before the Court is the question of the amount that ought to be assessed, in civil penalties, against defendant for polluting Virginia's water in violation of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (the "Act"). The Court has already determined, in granting plaintiffs' motion for partial summary judgment on the issue of liability, that defendant has violated the Act; the parties do not now contest liability. They do, however, differ over (i) defendant's maximum liability for its violations; and (ii) the appropriate penalty for those violations. Plaintiffs contend that defendant is subject to a maximum of $8,300,000 in civil penalties, and that the full measure of liability should be imposed. Defendant, on the other hand, contends that it is subject to a maximum of about $980,000 in civil penalties, and that the Court should assess somewhere between $12,000 and $20,000.

Defendant also vigorously contests the Court's subject-matter jurisdiction over this lawsuit. First, it argues that plaintiffs do not have standing to prosecute this action. Second, it argues that the statute does not authorize citizen suits against defendants who are not discharging unlawfully when the suit is filed.

Following trial, defendant sought and received the Court's leave to file a post-trial memorandum; about a month thereafter, defendant filed that memorandum. Plaintiffs filed a short response, and also had filed a trial memorandum on the day prior to trial. Several months later, defendant filed a motion to dismiss based on its argument that a continuing violation is required, which has been fully briefed. All the foregoing matters are now ripe for disposition.

BACKGROUND

This suit is a citizen enforcement action—a "citizen suit"—authorized by Section 505 of the Clean Water Act, 33 U.S.C. § 1365. Plaintiffs are two non-profit corporations dedicated to protecting natural resources: the Chesapeake Bay Foundation (CBF), a regional environmental group with over 19,000 members residing in the Chesapeake Bay area, including Virginia; and the Natural Resources Defense Council (NRDC), an environmental group with members throughout the nation, including over 800 members in Virginia. Defendant, Gwaltney of Smithfield, Ltd. (Gwaltney), is in the business of processing and packing pork products. It is a subsidiary of Smithfield Foods, Inc. (Smithfield Foods). Gwaltney's plant, the operation of which is the subject of this lawsuit, is situated on the Pagan River near Smithfield, Virginia. In the course of its production, the plant discharges wastewater into that river.

At all times material hereto, Gwaltney was allowed to discharge various pollutants from that plant into the river—within certain limits, as set out in a "National

Pollution Discharge Elimination System" (NPDES) permit.[1] Such permits are issued pursuant to procedures and regulations under the Clean Water Act. *See* 33 U.S.C. § 1342.

From October 27, 1981 until May 15, 1984, Gwaltney's plant exceeded its discharge limitation for a variety of pollutants[2] on a number of occasions. Gwaltney itself reported these violations in its discharge monitoring reports (DMRs), as required by law.[3] Prior to October 27, 1981, Gwaltney was not responsible for the pollution discharges from the plant at issue here. Instead, ITT-Gwaltney, Inc. (ITT-Gwaltney) owned the plant and was responsible. Under ITT-Gwaltney as well as under Gwaltney, the plant repeatedly exceeded a number of its NPDES discharge limitations. Gwaltney acknowledges that it was aware of ITT-Gwaltney's record of noncompliance. Only the violations subsequent to Gwaltney's assumption of responsibility on October 27, 1981, are at issue here, however.

The violations reported in Gwaltney's DMRs form the basis of this action. Where a permittee is in violation of an NPDES discharge limitation, it is also "in violation of . . . an effluent standard or limitation under [the Act]," 33 U.S.C. § 1365(a)(1), which makes the permittee subject to citizen suits. *Id.* For citizen suits under

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[1] NPDES Permit No. VA 0002844.

[2] Those pollutants are: (i) fecal coliform; (ii) chlorine (Cl_2); (iii) total suspended solids (TSS); (iv) total Kjeldahl nitrogen (TKN); and (v) oil and grease.

[3] Section 1318(a)(3)(A) of Title 33 mandates, among other things, that the Administrator of the Environmental Protection Agency "require the owner or operator of any point source" to establish and maintain such records of effluent discharges and to make such reports as the Administrator may "reasonably require." Currently, permittees under the Clean Water Act must submit DMRs. *See* 40 C.F.R. § 122.41(l)(4) (1984). Such reports are public information, by statute. *See* 33 U.S.C. § 1318(b)(2).

the Clean Water Act, Congress has authorized the district courts to assess appropriate civil penalties. 33 U.S.C. § 1365(a). Such penalties may be as high as "$10,000 per day of such violation." 33 U.S.C. § 1319(d).

DISCUSSION

I. Standing.

At the outset, the Court must dispose of defendant's contention that plaintiffs have no standing under either the Act or Article III of the Constitution. Standing is an element of jurisdiction over the subject matter. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 494-95 (1975). Thus, if plaintiffs have no standing, then the Court may not proceed further. *See id.*

Gwaltney contends that plaintiffs' allegations are insufficient to establish standing for CBF and NRDC to sue in their own right. It then acknowledges that the allegations of standing in the complaint, taken alone, might be sufficient for CBF and NRDC to sue on behalf of some of their members. But Gwaltney argues that no such standing has been established because plaintiffs did not present evidence of standing at trial, even though Gwaltney denied plaintiffs' standing allegations in its answer and Gwaltney's counsel demanded prior to trial that plaintiff's counsel establish at trial that plaintiffs meet the Clean Water Act's standing requirements as articulated in *Sierra Club v. SCM Corp.*, 747 F.2d 99 (2d Cir. 1984). Plaintiffs, on the other hand, argue that they have established standing to sue both in their own right and on behalf of their members. As for standing to sue for their members, they refer to the Court's findings in granting them summary judgment on the issue of liability, as well as to a number of affidavits they have filed at different stages of the litigation.

It is clear that, at least under the Clean Water Act,[4] a citizen enforcer can only establish standing if it meets the requirements of "injury in fact" set forth in *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). *See, e.g., Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 (2d Cir. 1984). An organizational plaintiff, such as CBF or NRDC, can establish "injury in fact" through injury to their members as well as through injury to the organization itself. *See, e.g., Sierra Club v. Morton*, 405 U.S. at 739. The parties do not dispute these basic principles of standing.

The Court need not consider the dispute over whether plaintiffs have established standing to sue in their own right, because it concludes that they have established standing to sue on behalf of their members. They established such standing when the Court granted their motion for summary judgment on the issue of liability. In support of that motion, plaintiffs included an affidavit of one of their counsel stating:

> Members of CBF reside in Virginia, in the vicinity of the Pagan River, and recreate in, on, or near, and otherwise use or enjoy the Pagan River and the water system of which it is a part. . . . The interests of CBF and of CBF's members have been, are being, and will be adversely affected by [Gwaltney's] failure to comply with its NPDES permit requirements.

The affidavit included an identical paragraph about members of NRDC. Defendant failed to dispute this in any

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[4] Standing requirements may be more lenient for citizen enforcers suing under the citizen suit provisions of other environmental statutes, where—unlike the Clean Water Act § 505(g), 33 U.S.C. § 1365(g)—there is no limitation of "citizen" to a person "having an interest which is or may be adversely affected." *See, e.g.*, Clean Air Act § 304(a), 42 U.S.C. § 7604(a) (1982) ("any person" can sue); *Metropolitan Washington Coalition for Clean Air v. Washington, D.C.*, 511 F.2d 809, 814 (D.C. Cir. 1975) (discussing standing requirements under the Clean Air Act).

way at the summary judgment hearing, although it had raised the standing issue at the pleading stage.[5] Indeed, Gwaltney failed to file any response whatsoever to plaintiffs' motion for summary judgment, despite the fact that two months had elapsed between the filing of plaintiffs' motion and the hearing on it. In granting plaintiffs' motion the Court specifically stated, in its findings of fact from the bench, that plaintiffs have standing to prosecute this action.

Apparently, Gwaltney believes that any showing of standing that plaintiffs may have made previously is insufficient in light of a recent decision by the Court of Appeals for the Second Circuit, *Sierra Club v. SCM*, *supra*, 747 F.2d 99, construing standing requirements under the Clean Water Act. Gwaltney suggests that the case establishes a requirement that plaintiffs identify affected members in order to establish standing under the Act. The Court does not agree, however.

In *Sierra Club v. SCM*, the issue pertaining to standing before the Court of Appeals was whether the Sierra Club, solely on the basis of its "institutional interest in the preservation of the enviromnent," could sustain "injury in fact" for standing purposes in a citizen suit under the Clean Water Act. *See Sierra Club v. SCM*, *supra*, 747 F.2d at 103. Writing for a unanimous panel, Judge Kearse rejected Sierra Club's contention. After carefully reviewing the legislative history of the Act, she concluded that the Sierra Club could only establish standing by showing actual injury within the meaning of *Sierra Club v. Morton*, 405 U.S. 727 (1972), and that the Sierra Club's "institutional interest" was insufficient in that regard. *Id.* at 107. She furthe held that an

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[5] Gwaltney filed a document titled "Answer and Motion to Dismiss," in which it denied plaintiffs' standing allegations in its "Third Defense." The answer and motion were unaccompanied by any documents that might create a genuine issue of material fact as to plaintiffs' standing, however.

organizational plaintiff can satisfy the actual injury requirement by "providing a concrete indication" that the organization or "one or more of its members" use the waterway into which the defendant discharges its wastes or would be adversely affected by the pollution of that waterway. *Id.*

Despite defendant's suggestion to the contrary, Judge Kearse did not hold that a plaintiff organization must identify its injured members in order to provide the requisite "concrete indication." It is true, of course, that the district judge had dismissed the complaint—at least in part—because the Sierra Club refused to identify any injured member. *See Sierra Club v. SCM Corp.*, 580 F. Supp. 862, 865 (W.D.N.Y. 1981). Despite the controversy in the district court over Sierra Club's refusal to identify members, though—of which the Court of Appeals was well aware, *see Sierra Club v. SCM*, *supra*, 747 F.2d at 102—the Court of Appeals carefully avoided holding that an organization suing under the Clean Water Act must identify injured members in order to establish standing through them. Instead, Judge Kearse —noting that the Sierra Club had submitted an affidavit indicating merely that some of its members lived within a seventy-mile radius of the polluting plant—chose more general language to describe the requisite showing for standing: a "concrete indication" that one or more members "used the [waterway involved] or would be affected by its pollution." Plaintiffs here have satisfied this standard. The unopposed affidavit of plaintiffs' counsel quoted *supra*, which indicates that members of plaintiffs' organization use the river into which defendant discharges its wastes, is sufficient to establish plaintiffs' standing under the Clean Water Act.[6]

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[6] In any event, plaintiffs did ultimately name members. In their response to defendant's post-trial memorandum, plaintiffs attached the affidavits of three affected members who indicated specifically how they used the Pagan River (or the Chesapeake Bay into which it flows), and how they are adversely affected by the pollution of the Pagan River.

II. Continuing Violation.

Gwaltney also argues that the Court has no jurisdiction over this suit because Gwaltney was not in violation of its NPDES permit when the complaint was filed, or subsequently. Gwaltney contends that the Clean Water Act's citizen suit provision only confers jurisdiction where the polluter is engaged in an ongoing violation; where the violation occurred entirely in the past, Gwaltney urges that there is no jurisdiction. Plaintiffs contend, on the contrary, that citizens can sue regardless of whether the polluter's unlawful conduct was continuing at the time the suit was filed.

The dispute is one of statutory construction. Gwaltney's argument centers around the portion of the Clean Water Act's citizen suit provision that reads, in pertinent part:

> . . . any citizen may commence a civil action on his own behalf—
>
> (1) against any person . . . who is alleged *to be in violation* of (A) an effluent standard or limitation under this chapter . . . .

33 U.S.C. § 1365(a)(1) (emphasis added). Gwaltney points out that the statute does not include the words "to have violated," and argues that the statute therefore only authorizes citizen suits against polluters whose unlawful conduct is occurring at the time the suit is filed.

In analyzing whether Gwaltney's position is correct, the Court begins with the familiar principal that it need not consider a statute's legislative history where the statutory language itself is clear. *See, e.g., Ex Parte Collett*, 337 U.S. 55, 61 (1949). Despite Gwaltney's protestations to the contrary, the Court does not believe that the statutory language on which Gwaltney rests its argument clearly supports Gwaltney's position. Other courts besides this one have perceived ambiguity in the statutory

language at issue. *See Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co.*, 600 F. Supp. 1474, 1476, (D.N.J. 1985); *Sierra Club v. Raytheon*, 22 Env. Rep. Cases 1050, 1054 (D. Mass. 1984). The words "to be in violation" may reasonably be read as comprehending unlawful conduct that occurred solely prior to to the filing of the lawsuit as well as unlawful conduct that continues into the present. For example, a person who under-pays taxes one year remains "in violation" of the relevant tax laws, even though that person pays the proper amount of taxes for the following year. Similarly, a polluter that exceeds various discharge limitations in its NPDES permit, such as Gwaltney, arguably remains "in violation" with respect to those excesses, even though in subsequent years it brings itself into compliance. Indeed, its discharge violations remain on the records, and the effects of the excess discharges may linger well after they occur.

In addition to the ambiguity in the words "to be in violation" standing alone, other portions of Section 1365 suggest that Gwaltney's proffered construction is not the only—or the most—plausible one. Section 1365 states that:

> The district courts shall have jurisdiction . . . to apply any appropriate civil penalties under [33 U.S.C. § 1319(d)].

33 U.S.C. § 1365(a). Section 1319(d) authorizes civil penalties "not to exceed $10,000 per day of . . . violation." 33 U.S.C. § 1319(d). Neither Section 1319(d) nor the citizen-suit provision itself expressly limits the imposition of such civil penalties to polluters that persist in their unlawful conduct up to the time the complaint is filed. On the contrary, the absence of any such limitation implies that Congress intended to authorize citizen suits to recover civil penalties based on a polluter's unlawful conduct in the past, regardless of whether the polluter has ceased its unlawful conduct by the time the

citizen suit is brought. In the Court's view, the statutory language, fairly read, suggests that the Act authorizes citizen suits for civil penalties based on unlawful conduct that occurred in the past, regardless of whether a polluter is in compliance when the suit is brought.

In view of the ambiguity of the statutory language, however, the Court has also reviewed relevant portions of the legislative history in order to better understand Congress's intent. The committee reports do not expressly address the issue at hand one way or another. They do, however, note that the statute authorizes the recovery of civil penalties in citizen suits. The reports do not discuss any requirement that such suits must be based on unlawful conduct occurring at the time the suit is filed. *See* H.Rep. No. 911, 92d Cong., 2d Sess. 133 (1972), *reprinted in* 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972* at 820 (1973) (hereinafter "Legislative History"); S.Rep. No. 414, 92d Cong., 1st Sess. 79, *reprinted in* 2 *Legislative History* at 1497. As already referred to, the absence of any discussion of such a requirement—in the context of acknowledging the general availability of civil penalties—implies that such a requirement was never contemplated.

The legislative history provides direct support, as well as support by implication, for the view that the Clean Water Act authorizes citizen suits based on unlawful conduct that occurred in the past regardless of whether the conduct continues through the time the complaint is filed. Senator Muskie, the manager in the Senate of the bill that added the citizen suit provision to the Act, stated:

> . . . a citizen has a right under Section 505 to bring an action for an appropriate remedy in the case of *any person who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one.*

See 118 *Cong. Rec.* 33,700, *reprinted in* 1 *Legislative History* at 179 (emphasis added). Gwaltney acknowledges that Senator Muskie's remark supports plaintiff's position and undermines its own. But it attempts to eliminate the force of his explication by noting that it is the remark of only an individual legislator. To be sure, a court cannot allow colloquies among legislators to materially alter clear statutory language. *See, e.g., Regan v. Wald*, —— U.S. ——, ——, 52 U.S.L.W. 4966, 4970 (1984). But such is not the case here. Rather, Senator Muskie's remark lends further support to a plausible reading—and one which is uncontradicted by the statute itself and other legislative materials [7]—of ambiguous statutory language.

A reading of the citizen-suit provision that would authorize suits for civil penalties against polluters for past

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[7] Gwaltney also quotes a remark of Senator Bayh in support of its position. Senator Bayh's remark is as follows:

> These sorts of citizen suits—in which a citizen can obtain an injunction but cannot obtain money damages for himself—are a very useful additional tool in enforcing environmental protection laws.

1 *Legislative History* at 221. Gwaltney argues that the fact that Senator Bayh did not mention civil penalties—and did mention injunctive relief—somehow indicates that Senator Muskie's explication was an inadvertent misstatement. The Court disagrees. Senator Bayh's statement hardly contradicts Senator Muskie's explication. It is, rather, an accurate statement of a citizen-enforcer's remedies under the Clean Water Act with respect to injunctions and money damages—and simply does not address the circumstances when a citizen suit for civil penalties may be maintained.

Gwaltney also calls attention to occasional references in the legislative history to "abatement" actions. *See* S.Rep. No. 414, 92d Cong., 1st Sess. 79-82, *reprinted in* 2 *Legislative History* at 1497-1500. Such references, however, do not persuade the Court that abatement of continuing unlawful conduct was the only avenue of relief Congress contemplated when it authorized citizen suits under the Act. *See Student Public Interest Research Group of New Jersey v. Monsanto Co.*, 600 F. Supp. 1474, 1476 (D.N.J. 1985).

unlawful conduct regardless of their compliance status when the suit is filed is also consistent with one of the primary policy objectives inherent in the concept of citizen suits: deterrence of violations. Indeed, unless citizens may sue for civil penalties in such circumstances, citizen suits would provide little, if any, additional incentive for polluters to comply with their discharge limitations until a citizen suit is actually commenced. *See also Monsanto, supra*, 600 F. Supp. at 1476-77; *Sierra Club v. Aluminum Company of America*, 585 F. Supp. 842, 854 (N.D.N.Y. 1984).

If citizen suits under the Act were limited to situations where the polluter is engaged in unlawful conduct when the suit is filed, the deterrence effect of citizen suits would also be undermined by the evidentiary difficulties citizen enforcers would fact in establishing that a polluter is currently discharging unlawfully. As the Senate Report recognized, one of the keys to the sucecssful functions of the Act's citizen suit provision is disclosure of a polluter's discharge information. *See* S.Rep. No. 414, 92d Cong., 1st Sess. 81 (1971) *reprinted in* 2 *Legislative History* at 1499 ("The information and other disclosure provisions required throughout the bill are important to the operation of this provision."). And, indeed, Gwaltney's DMRs form the basis of this lawsuit. But, as plaintiffs have pointed out, such reports are not available until at least a month—and sometimes more—after the discharge occurs. Gwaltney's proffered construction of the Act would engage the litigants in discovery battles over whether a polluter is no longer discharging unlawfully; and it would engage the courts in a search for standards to apply in determining whether a polluter's conduct can fairly be viewed as continuing in violation. *See Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 399 (5th Cir. 1985) (Williams, J., concurring) (attempting to define what constitutes "in violation"); *Friends of the Earth v. Facet Enterprises, Inc.*, 22 Env. Rep. Cases 1143, 1145 n. 1 (W.D.N.Y.

1984) (". . . it is difficult for a plaintiff to verify that a violation is occurring at the very time that plaintiff is filing a notice of intent to sue. . . . I am not prepared to draw a line that Congress has not drawn, defining the point at which violations are sufficiently "recent" to form the basis of a citizen suit. To my mind, that line has been drawn already [by the relevant statute of limitations]."") Such a situation would also be contrary to Congress's understanding that citizen suits involve "manageable and precise benchmarks for enforcement." S.Rep. No. 92-414, 1st Sess. 81 (1971), *reprinted in* 2 *Legislative History* at 1499.[8]

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[8] The problem of determining whether a violation is a "continuing" one is highlighted well in this case. Plaintiffs filed this suit in mid-June of 1984. With a history of violations of its TKN limitations in the wintertime, Gwaltney had just experienced another winter of repeated violations of its TKN limitations, despite the changes it had implemented in its wastewater treatment system to address the problem. At the time of trial in December of 1984, one of Gwaltney's own witnesses—Mr. Sneed—expressed doubt as to whether Gwaltney would meet its TKN limitations. It was not until Gwaltney had experienced a full winter without problems that it could make its motion to dismiss based on its present compliance, with a secure belief that it was indeed in compliance. Thus, plaintiffs' allegation in the complaint, that Gwaltney was continuing to violate its NPDES permit when plaintiffs filed suit appears to have been made fully in good faith. On these facts, the Court believes that even if Gwaltney were correct that a district court has no jurisdiction over citizen suits based entirely on unlawful conduct that occurred entirely in the past, the Court would still have jurisdiction here. A useful analogy is the manner in which the federal courts treat the jurisdictional amount requirement in diversity cases. Gwaltney has raised this analogy in support of its position that the Court is without jurisdiction here. The Court disagrees, and concludes that the analogy supports the position that it does have jurisdiction here.

In diversity cases, the question whether the jurisdictional amount is satisfied—and whether the court, ultimately, has jurisdiction—is not answered by whether the plaintiff ultimately recovers in excess of $10,000. *See, e.g.*, 14A C. Wright, A. Miller, E. Cooper, *Federal Practice & Procedure* § 3702 at 31-33, and cases cited (1985). Rather, the issue is whether the amount plaintiff *stated in the*

In light of the language of the Clean Water Act's citizen suit provision, its legislative history, and its underlying policy goals, the court concludes that the Clean Water Act authorizes citizen suits for civil penalties for violations of the Act, regardless of whether the polluter is engaged in unlawful conduct at the time the suit is filed or afterward. A number of other courts have recently reached the same conclusion. *See, e g., Monsanto, supra,* 600 F. Supp. at 1476-77; *Aluminum Company of America, supra,* 585 F. Supp. at 853-54; *Sierra Club v. Raytheon, supra,* 22 Env. Rep. Cases at 1054; *Student Public Interest Research Group of New Jersey v. Anchor Thread Co.,* 22 Env. Rep. Cases 1150, 1154 (D.N.J. 1984); *see also Student Public Interest Research Group of New Jersey v. Tenneco Polymers,* 602 F. Supp. 1394, 1398-99 (D.N.J. 1985); *Facet Enterprises, supra,* 22 Env. Rep. Cases at 1145 n.1.

Gwaltney is not, however, without authority for its position. It relies heavily on *Hamker v. Diamond Shamrock Chemical Co.,* 756 F.2d 392 (5th Cir. 1985). In that case, the Court of Appeals for the Fifth Circuit held that a person cannot maintain a citizen suit under the Clean Water Act unless the polluter's conduct is unlawful at the time the suit is filed, and cannot be brought for civil penalties for past violations. *Id.* at 396. This Court, respectfully, disagrees.

First, the Court notes that the panel concluded the statutory language is not sufficiently ambiguous to raise any question about its proper meaning. *See id.* at 395.

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original claim satisfies the amount, and is made in good faith. *See,* e.g., *Wiggins v. North Carolina Equit. Life Assur. Co.,* 644 F.2d 1014, 1016-17 (4th Cir. 1981). As Gwaltney recognizes, the test of good faith is whether it appears to be a "legal certainty" that the jurisdictional fact is not satisfied. *See St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283, 288-89 (1938); *Wiggins, supra,* 644 F.2d at 1016-17. But there was no certainty here—legal, factual, or otherwise—that Gwaltney's system would correct one of the two major violation problems for which this suit was brought—until nearly one year after the suit was filed.

As discussed *supra*, however, this Court—and several others—have examined the language without being able to resolve its plain meaning with the same degree of certainty.

Second, the *Hamker* panel reasoned that because the statutory scheme centers primary enforcement responsibility with the states and the Administrator of EPA, citizens are not authorized to sue polluters unless the polluter is engaged in ongoing unlawful conduct. *Id.* at 395-96. But this Court does not comprehend how the conclusion necessarily follows from the premise. For, even if the statute is construed to allow citizens to sue for past violations, primary enforcement responsibility remains with the states and the administrator: generally, citizens must first notify the states, the administrator, and the alleged polluter and wait sixty days to give public enforcement authorities the opportunity to act before proceeding. *See* 33 U.S.C. § 1365(b)(1)(A). The panel also reasoned that because the statute requires the citizen-enforcer to notify the violator—as well as enforcement authorities—of its intent to sue, the statute contemplates that a citizen loses the right to sue if the violator brings itself into compliance before the sixty days elapses, just as the citizen loses the right to sue if the governmental authorities commence prosecution in a court before sixty days elapses. *Id.* at 396. This reasoning is unpersuasive. The statute expressly provides that public enforcement within the sixty-day period precludes a citizen suit, *see* 33 U.S.C. § 1365(b)(1)(B), but does not anywhere state that the violator's compliance within the sixty-day period deprives a citizen of the right to sue. It thus appears inappropriate to infer that compliance by the violator carries the same consequences for citizen enforcement as initiation of a government enforcement action[9].

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[9] The Court also notes that the committee reports, as well as the statute itself, do not indicate that one of the purposes of the

Finally, the *Hamker* panel reasoned that construing the provision to preclude citizen suits for civil penalties based on past violations would promote the goal of limiting the burden on the federal courts. But this Court is not persuaded that such a construction would ultimately reduce the federal judiciary burden. If such a construction were adopted, citizen suit provisions would provide an incentive for compliance only in those specific cases where the citizen-enforcer actually files a notice of intent to sue and then a complaint. The threat of citizen suits would have little general deterrent effect. It is not unreasonable to presume that under such a system, noncompliance would be more widespread than under a system where it is clear that citizens can sue for civil penalties for past violations. If the number of citizen suits is related to the level of noncompliance—a reasonable assumption—then it may well be that the number of suits actually filed per period of time would be greater under a system in which citizens cannot sue for civil penalties for past violations.

In considering the persuasiveness of *Hamker*, this Court also notes that the *Hamker* panel did not address the legislative history militating against its construction of the statute. As discussed *supra*, the legislative history corroborates the view that citizens can sue for civil penalties for past violations.

Gwaltney also relies on *City of Evansville, Indiana v. Kentucky Liquid Recycling*, 604 F.2d 1008 (7th Cir. 1979), *cert. denied sub nom Louisville and Jefferson County Metropolitan Sewer District v. City of Evans-*

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sixty-day notice requirement is to give a violator the opportunity to come into compliance and avoid liability. *See* H. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972), *reported in* 1 *Legislative Histo.y*, at 820; S. Rep. No. 414, 92d Cong., 1st Sess. 79-80 (1971), *reprinted in* 2 *Legislative History* at 1497-98. Rather, the sole purpose appears to be to "encourage and provide for agency enforcement." S. Rep. No. 414, 92d Cong., 1st Sess. 79 (1971), *reprinted in* 2 *Legislative History* at 1497.

ville, Indiana, 444 U.S. 1025 (1980). In that case, the Court of Appeals for the Seventh Circuit remarked that the Clean Water Act "does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past or for recovery of damages." *Id.* at 1014. That remark, however, insofar as it can be said to address citizen suits for civil penalties for past violations, is only *dicta*. The issue in the case was whether citizen suits may be brought for damages. The panel did not at all analyze whether the statute authorizes citizen suits for civil penalties for past violations.[10] The case of *Pawtuxet Cove Marina v. Ciba-Geigy Corp.*, 21 Env. Rep. Cases 1393 (D.R.I. 1984), which Gwaltney also cites, relies primarily on *City of Evansville* to reach its conclusion. *See id.* at 1394 (referring to cases cited in magistrate's decision, 21 Env. Rep. Cases 1390, 1391). Accordingly, the Court does not find the case to be persuasive.

Finally, Gwaltney relies on *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981). Gwaltney focuses on Justice Powell's observation that "this provision allows suits under the Act by private citizens, but authorizes only prospective relief. . . ." *Id.* at 6. This observation, however, like the remark of the Seventh Circuit in *City of Evansville*,

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[10] Plaintiffs argue that a case decided by the Court of Appeals for the Seventh Circuit subsequent to *City of Evansville* implicitly rejects the position with respect to citizen suits based on past violations that *City of Evansville* took. That case, *People of the State of Illinois v. Outboard Marine Corporation, Inc.*, 680 F.2d 473 (7th Cir. 1982), is not as on point as plaintiffs argue. The case does reflect the understanding that the United States can sue under the Clean Water Act for injunctive and other relief based on past discharges, regardless of a polluter's present compliance. *See id.* at 480-81. It also reflects the understanding that citizens may intervene in such cases. *Id.* at 480. It simply does not address the question whether citizens themselves can sue for civil penalties based on a polluter's unlawful conduct, that occurred entirely in the past, however.

arose in the context of whether a citizen enforcer may sue for damages. The Supreme Court, like the Seventh Circuit, concluded that one may not. Later in the opinion it did recognize that civil penalties are authorized in citizens suits. *See id.* at 14 n. 25. It had no occasion to consider or remark about whether a citizen enforcer may sue a polluter for civil penalties based on past violations.

III. Maximum Liability.

The number of days during which a polluter violates a limitation in its permit sets the polluter's maximum liability in civil penalties for violating that limitation. The subsection of the Clean Water Act authorizing civil penalties states that a polluter in violation of, among other things, permit limitations such as those forming the basis of this suit "shall be subject to a civil penalty not to exceed $10,000 per day of such violation." 33 U.S.C. § 1319(d). Determining the number of days involved in a given violation is thus an important aspect of assessing civil penalties. Determining whether, and in what circumstances, a polluter can be subjected to a penalty of greater than $10,000 per day for permit violations is also important. The parties dispute the law on both points.

A. Number of days involved for violating a monthly average. Gwaltney has violated its "monthly average" permit limitations for several substances on a number of occasions. The "monthly average" of a substance reflects the average amount (or concentration, where the substance is measured by concentration instead of by amount) of the substance discharged per day, based on an average of measurements taken for that substance over the course of a month. The monthly average for the pollutants at issue in this case is roughly half of the maximum daily amount allowed.[11] Gwaltney argues that

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[11] The average and maximum permit limitations for four of the pollutants at issue in this case read as follows on Gwaltney's DMR for May, 1984: (i) for TSS: 228.000 KG/D (daily average

a violation of a monthly average constitutes a single day of violation. Plaintiffs, on the other hand, maintain that a violation of a monthly average constitutes thirty days of violation.

As discussed above, the relevant section of the Clean Water Act authorizing civil penalties reads that: "any person who violates . . . any permit condition or limitation . . . shall be subject to a civil penalty not to exceed $10,000 per day of such violation." 33 U.S.C. § 1319(d). Thus, to determine the maximum authorized penalty for the violation of a monthly limitation, the Court must consider how many days are involved in such a violation. It is difficult for this Court to imagine how the violation of a monthly limitation involves any number of days other than the number of days in that month. Violating a monthly limitation, then, subjects a polluter to a maximum penalty of $300,000. Similarly, a violation of a weekly limitation would, it seems, necessarily involve seven days. At least one other district court has reached the same conclusion. *See United States v. Amoco*, 580 F.Supp. 1042, 1045 (W.D. Mo. 1984).

Although it cites neither cases nor legislative history in support of its position, Gwaltney contends that this conclusion is nevertheless wrong primarily because it believes it can be unjust.[12] To illustrate its point, Gwaltney

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over a month), 455.000 KG/D (daily maximum); (ii) for fecal coliform: 200.0000 N/CML (daily average over a month), 400.000 N/CML (daily maximum); (iii) for TKN: 109.0000 KG/D (daily average over a month), 219.0000 KG/D (daily maximum); (iv) for oil and grease: 78.0000 KG/D (daily average over a month), 156.0000 KG/D (daily maximum). For chlorine, (Cl_2), there was no average limitation: rather, a daily minimum (1.5000 MG/L) and maximum (2.5000 MG/L) were set.

[12] Gwaltney raises two other arguments against treating the violation of a monthly limitation as a thirty-day violation.

First, Gwaltney contends that to characterize a violation of a monthly limitation as thirty days of violation is contrary to the principle that penal statutes are to be construed strictly. *See,*

suggests a hypothetical: a polluter discharges, for twenty-nine days of a month, 98% of the amount that it must average each day in order to meet its monthly average; on the last day, however, the polluter discharges 180% of that amount. Because of the last day's discharge, the polluter would violate its monthly average; yet, if its permit allowed a daily maximum twice as great as the monthly average (as Gwaltney's does), the polluter would not have violated its daily maximum for the substance at all during the entire month. In Gwaltney's view, subjecting the polluter to thirty days' liability because of the monthly violation is unjust, especially in light of the fact that the polluter never exceeded its daily maximum.

The Court disagrees. Part of Gwaltney's argument is based on the suggestion that no real harm is being done where maximum daily limitations are not violated. But the mere fact that a daily maximum is not violated does not mean that the polluter's discharges are harmless.

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e.g., Commissioner of Internal Revenue v. Archer, 361 U.S. 87, 91 (1959). Adhering to this proposition does not affect the Court's conclusion. The words of the statute authorize a penalty of up to $10,000 "per day of such violation." Because a violation of a monthly limitation necessarily involves a violation over an entire month, a maximum penalty of $10,000 per day of the month is plainly within the words of the statute and therefore does not violate any principal of strict construction.

Second, Gwaltney argues that one of the stipulations, in conjunction with the plaintiffs' response to an interrogatory, precludes plaintiffs from arguing that Gwaltney's violation of a monthly limitation subjects Gwaltney to a penalty for every day of the month. The parties stipulated that 160 violations had occurred, and plaintiffs had indicated in response to an interrogatory that "the total dollar amount of civil penalties" they would seek would be "10,000 per violation." Some of the violations that were stipulated were, of course, violations of monthly limitations. Gwaltney is correct that plaintiffs now take a position on penalties that is technically inconsistent with their interrogatory response because they said "$10,000 per violation" instead of "$10,000 per day of each violation." But such an event, parties' responses to interrogatories do not preclude this Court from imposing appropriate penalties.

Daily maximums for the pollutants at issue are no doubt more lenient than the monthly average because the environment may be able to absorb a relatively high discharge in a single day without incident—while a substantially lower discharge over the course of a month may present an environmental problem. In any event, the water pollution authorities have established the allowable discharge levels for various time intervals in order to ensure that water quality standards are met. It is not for the district court to decide, in a citizen suit proceeding, that a permit limitation an agency has fixed is unnecessary.

Another part of Gwaltney's argument is based on the fact that only on one day did its hypothetical polluter exceed the amount that it needed to maintain each day in order to meet the month's average. But this too is unpersuasive. The average is based on discharges over the entire month. When a polluter violates a monthly average, every day of its discharges contributes to the violation, even if most of the discharges are within the average that the polluter needs to maintain in order to stay within the monthly limitation.[13]

The problem with Gwaltney's position is further illustrated when one considers a counter-hypothetical: the polluter nearly exceeds—but does not pass—its daily maximum every day of a month. Such a polluter would

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[13] Gwaltney also suggests that its violations of a monthly average cannot be presumed to be a violation during every day of the month, because the average may be computed based on measurements taken less frequently than every day. The Court recognizes that Gwaltney's permit requires it to monitor many of its discharges only three days per week, rather than every day. But even though those periodic tests do not establish with absolute certainty that Gwaltney's actual monthly average exceeded the permitted amount, it is nevertheless reasonable to presume that they do establish such a monthly violation—especially in light of Gwaltney's failure to introduce more accurate evidence to the contrary.

far exceed the monthly average, and would be liable for violating that limitation. But Gwaltney's position, if adopted, would constrain a court to treat such conduct as one single day of violation, thereby preventing a court from imposing over $10,000 in penalties for a full month of substantial discharges. Such a limitation does not strike this Court as a sensible one, much less as consistent with the statute.

Ultimately, the district court has discretion to determine the appropriate penalty under Section 1319(d) for a day of violation. As the district court noted in *Amoco*, merely because a polluter is subject to $300,000 in penalties for violating a monthly standard does not necessarily mean that those penalties will be imposed. *See Amoco*, *supra*, 580 F. Supp. at 1045. The $300,000 is a maximum penalty under the statute, not a mandatory one. *See* 33 U.S.C. § 1319(d). Thus, the district court can consider any appropriate factors in arriving at a penalty. But it ought not to have its hands tied, when crafting a penalty for a violation of a monthly limitation, by a $10,000 limit.

B. Maximum penalty per day where multiple violations occur within a day. In some instances, Gwaltney violated discharge limitations for several substances on the same day. Gwaltney argues that the Clean Water Act limits its liability to $10,000 per day, regardless of the number of its violations on a given day. Plaintiffs, on the other hand, argue that the Act only limits a permittee's liability to $10,000 per day per violation of the discharge limitations on a given substance.

The relevant statutory provision states that:

> Any person who violates . . . any permit condition or limitation [implementing any of several enumerated sections of the Clean Water Act, in a permit such as Gwaltney's NPDES permit] . . . shall be

> subject to a civil penalty not to exceed $10,000 per-day of such violation.

33 U.S.C. § 1319(d). There is no question here that Gwaltney's NPDES permit is a type of permit encompassed under this subsection. Nor is there any question that all of the limitations at issue in Gwaltney's permit are limitations implementing sections of the Clean Water Act enumerated in Section 1319(d). The parties merely dispute the proper construction of the phrase "$10,000 per day of such violation."

Gwaltney relies on *United States v. Detrex Chemical Industries, Inc.*, 393 F. Supp. 735 (N.D. Ohio 1975). In that case, the district court rejected the view that 33 U.S.C. § 1319(d) can be read to authorize "$10,000 per violation per day." *Id.* at 738. The district court first concluded that the statutory language is ambiguous. *See id.* at 736. It next reviewed the legislative history and found references to the Act's authorizing penalties up to "$10,000 per day" and "$10,000 per day of violation," without any use of the words "of such violation." *See id.* at 737. It also concluded that $10,000 per day as an absolute maximum provides an adequate deterrent, and is consistent with other provisions of the Clean Water Act. *See id.* at 736-37.

Plaintiffs suggest that the appropriate reading of Section 1319(d)—and what the *Detrex* court intended—was that Section 1319(d) establishes a maximum daily penalty of $10,000 for violating the limitations on any given *substance*, not an absolute daily maximum. For example, if a polluter violates its limitations for fecal coliform as well as for TKN on the same day, it is subject to a maximum civil penalty of $20,000, not $10,000. On the other hand, if the polluter violates two different limitations—such as the monthly average and the daily maximum—for TKN only, on a given day, it is subject to no more than $10,000 in civil penalties for that day of violation. They rely on *dicta* in a recent district court case,

United States v. Amoco Oil Co., 580 F. Supp. 1042, 1046-47 n.1 (W.D. Mo. 1984) to support their belief that the *Detrex* holding can be harmonized with this construction of Section 1319(d), and that this construction is indeed the correct one. In *Amoco*, the district judge remarked that "a good argument can be made for the idea that violations of the daily limit for two or more *different effluents* should be subjected to separate penalties." *Id.* at 1047 n.1 (emphasis original).

The Court does not believe that *Detrex* can be harmonized with the plaintiffs' and the *Amoco* court's construction of Section 1319(d). Indeed, the district judge in *Amoco* acknowledged that "there are indications" that *Detrex* cannot be harmonized with his own (and plaintiffs') proffered construction. *Amoco*, *supra*, 580 F. Supp. at 1047 n.1. In order to harmonize the two, plaintiffs correctly point out that the reported opinion in *Detrex* does not indicate whether the multiple violations per day that were at issue involved the same substance or different ones. They suggest that the "multiple per day violations" that the case addressed may have involved repeated violations on the same day of an hourly limitation for a single substance. This may be true, of course. But whether or not the facts were as limited as plaintiffs suggest, the *Detrex* court clearly contemplated the issue in terms of an absolute maximum penalty per day, regardless of whether the limitations violated were for the same or different substances:

> . . . a $10,000 per day civil penalty, regardless of the number of violations of § 1311, 1312, 1316, 1317, or 1318 of Title 33 or of any permit condition or limitation or of any order of the E.P.A. more than adequately effectuates the Congressional purpose of a "real" threat of sanction.

Detrex, *supra*, 393 F. Supp. at 738.

The Court concludes that the *Detrex* court's construction is the appropriate one. Section 1319(d) authorizes

a maximum of $10,000 per day in civil penalties for violations that are enumerated therein, even where the defendant has violated discharge limitations for several substances during the same day.

In view of the contrary suggestion in *Amoco*, it may be helpful to explain the Court's reasoning further. As the *Detrex* court remarked, the statute itself is ambiguous. To elaborate on this, the words "$10,000 per day of such violation" may be read, as plaintiffs would suggest, to mean "$10,000 per day per each violation." On the other hand, the words may also be read as indicating how the number of days for a maximum civil penalty of $10,000 can be imposed should be computed: that is, to clarify that the maximum civil penalty may be imposed for each day of an enumerated violation—rather than, for example, being limited to the day on which a violation is reported, or to the day on which the Administrator gives an order that the defendant violates, or to the days on which the defendant violates some provision of the Clean Water Act beside the enumerated ones. All of these alternate readings may have been at least arguable if the statute had ended with the words "$10,000 per day," omitting the words "of such violation."

In view of the ambiguity in the statute itself, the *Detrex* court examined the legislative history and found several indications that Congress intended to authorize an absolute daily maximum. *See Detrex, supra*, 393 F. Supp. at 737. The Court need not elaborate further on this point, nor on the other reasons for this construction that *Detrex* discusses. Plaintiffs do not raise any persuasive reasons for choosing their construction over the one that Gwaltney has offered and that the *Detrex* court and this Court find to be correct. Their primary argument is based on the language of Section 1319(d) itself and the fact that the *Amoco* court, in *dicta*, suggested the same reading based on that language. As the Court has already demonstrated, however, that language is amen-

able to various other readings as well. Plaintiffs provide no legislative history in support of their position. And their primary policy argument is that deterrence is better effectuated by their position. This, however, is unclear. A maximum penalty of $10,000 per day may amount to a substantial deterrent against violations by even the largest corporations where more than a few days of violation are involved, as will be come clear *infra*. The Court is satisfied that its construction of Section 1319(d) accurately reflects the intent of Congress.

C. Maximum civil penalty applicable to Gwaltney. In light of the foregoing principles for calculating days of violation, the Court is now able to determine the number of days for which Gwaltney is, in its view, subject to a $10,000 maximum penalty. The parties have stipulated to the number of violations, based on Gwaltney's DMRs from November, 1981 to August, 1984. Copies of the DMRs themselves are also in evidence. The DMRs reflect which of the stipulated violations involve monthly limitations, and which ones involve daily limitations. The Court has summarized Gwaltney's violations in Appendix A.

During twenty-two of the thirty-three months for which are in evidence, Gwaltney violated the monthly average for at least one substance. During these same months, Gwaltney almost always violated more than one daily maximum or monthly average limitation. But under the principles discussed above, Gwaltney is subject to no more than $10,000 per day of violation, regardless of how many violations occurred on that day. There were 653 days in those twenty-two months;[14] thus, there were 653 days of violation. For those days of violation, Gwaltney is subject to a maximum penalty of $6,530,000.

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[14] Actually, a total of 669 days are in the twenty-two months involved. The parties have stipulated, however, that during the last of those 22 months—May, 1984—no violations occurred after May 15. Accordingly, the Court has treated Gwaltney's violation of its May, 1984 monthly average for TKN as involving only 15 days of violation.

In addition, Gwaltney violated daily limitations during five months when it reported no violation of monthly averages. In July 1982 it violated two limitations; it also violated two limitations during each of the three months following. Finally, Gwaltney violated five daily maximum limitations in February, 1984, making a total of 13 violations of daily standards during months when no violations of monthly averages occurred.

The DMRs do not indicate on which day of the month a given violation occurred, however. Therefore, it is impossible for the Court to discern whether any of these daily violations occurred on the same days. Conceivably, there were as few as seven different days of violation.[15] Plaintiffs have not demonstrated that each of these thirteen violations of daily standards occurred on different days.

The Court nevertheless believes that it is reasonable to presume that each of these did occur on a different day. Gwaltney has contended throughout this litigation that it is subject to a maximum penalty of $10,000 for a given day of violation, regardless of how many violations occurred on that day. Gwaltney also has complete access to any relevant records, so that it could have presented evidence to show that any of the violations occurred on the same day, if such evidence indeed existed. In the absence of such evidence, the Court concludes that Gwaltney's violations during those five months occurred on

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[15] In July 1982, for example, there was one fecal coliform violation and one chlorine violation. Those violations could have occurred on the same day, because tests for fecal coliform were performed three times per week, and tests for chlorine were performed hourly, according to the DMRs. Each of the two reported chlorine violations in August, September, and October, 1984, could have occurred on the same day because chlorine was tested on an hourly basis.

In February 1984, the single TKN violation and the two fecal coliform violations could have occurred on the same days as the three oil and grease violations. Tests for all three substances were performed three days per week, according to the DMRs.

thirteen different days. These violations increase Gwaltney's maximum liability in civil penalties by $130,000. Adding this to the maximum penalty for the months when Gwaltney violated monthly standards, $6,660,000 is the maximum civil penalty to which Gwaltney is subject.

IV. Gwaltney's Penalty.

As the Court has already discussed, the penalty of $10,000 per day of violation authorized by Section 1319 (d) is a maximum penalty, not a mandatory one. The Court now faces the task of determining the actual penalty, within the statutory limits, that Gwaltney shall be assessed. The parties differ markedly on this point. Plaintiffs urge the Court to impose the statutory maximum: here, as the Court has discussed, over $6,000,000. Gwaltney argues that a far smaller amount ought to be assessed: somewhere between $12,000 and $20,000.

Despite their widely varying estimates of the appropriate penalty, the parties agree that the United States EPA's civil penalty policy, *see* Environmental Protection Agency Civil Penalty Policy, [Federal Laws] *Env't Rep.* (BNA) 41:2991 (June 1, 1984) (hereinafter cited as "EPA Penalty Policy"), is an appropriate guideline for determining the amount of Gwaltney's penalty. Neither of the parties argue that the policy binds the Court. Nor indeed does it. Nevertheless, both parties suggest—and the Court agrees—that EPA's penalty policy provides a helpful analytical framework for arriving at a civil penalty. It is especially useful in light of the substantial maximum penalty that the statute authorizes, on the one hand, and the total absence of guidance Congress has provided in assessing penalties pursuant to Section 1319 (d), on the other hand. *Cf.* Clean Water Act § 311(b)(6), 33 U.S.C. § 1321(b)(6) (in determining the amount of the penalty for types of violations of the Clean Water Act not at issue in this case, the following factors shall be considered: the size of the business involved; the effect of the penalty on the business' ability to continue; and the gravity of the violation). Finally, there are

few cases that explain in any detail how they arrive at a penalty amount under Section 1319(d).

A. The EPA Penalty Policy. The policy aims at two general goals: (i) deterrence; and (ii) "fair and equitable treatment of the regulated community." *See* EPA Penalty Policy, 41:2992-93. As for deterrence, the policy recognizes that both deterrence of future violations by the violator (specific deterrence) and by other regulated firms (general deterrence) is important. *See id.* at 41:2992. For deterrence purposes, the policy recommends a penalty that includes two components. First, it should include the "economic benefit of non-compliance"; otherwise, the violator and potential violators would perceive that it pays to violate the law, creating an obvious disincentive for compliance. *See id.* Second, the penalty should include an additional amount, which the policy characterizes as a "gravity component." If the penalty were limited to the economic benefit of non-compliance, regulated firms would find that they would have nothing to lose by non-compliance because a penalty for their violations would make them no worse off than if they had complied in a timely way. *See id.* The policy suggests that the gravity component reflect both the seriousness of the violation and—where extensive non-compliance with a regulatory program exists in an area—an additional amount to promote general deterrence purposes. *See id.*

Once an appropriate penalty for deterrence purposes has been estimated, the policy recommends that this "preliminary deterrence amount" be adjusted to ensure that the "regulated community" is fairly treated. *See* EPA Penalty Policy at 41:2992. The policy identifies a variety of factors that ought to be accounted for in arriving at a final civil penalty. Such factors include the degree of willfulness or negligence involved, the degree of cooperation involved, the violator's history of non-compliance, and whether the penalty would force the violator out of business. *See* EPA Penalty Policy at 41:3000-02.

B. Gwaltney's violations. Although the parties have stipulated to over 160 different violations involving five different substances, the Court shall consider two distinct compliance problems in arriving at Gwaltney's penalty. Each problem related to a specific pollution control method at the plant. Inadequacies in one method or the other account for virtually all of the violations at issue here.

1. Chlorination problems. From November, 1981 to October, 1982, Gwaltney experienced problems with its chlorination process. These problems caused Gwaltney's violations of its fecal coliform and chlorine limitations during that time. Fecal coliform, a type of microbe associated with human and animal feces, is a good indicator of the safety of water for drinking, swimming, and shellfish harvesting. Gwaltney's permit includes both monthly average and daily maximum limitations on its discharges of fecal coliform. Chlorine is a toxic chemical that the state requires Gwaltney to use—in appropriate concentrations—to kill fecal coliform. Chlorine also kills other life forms where its concentration is high enough, however. Thus, Gwaltney's NPDES permit imposes daily maximum as well as minimum limitations on the concentration of its chlorine discharges. From July, 1981 (before Gwaltney bought the plant) until October, 1982, the plant chronically violated its permit limits for fecal coliform and chlorine. These violations were due to both insufficient and excessive exposure of Gwaltney's waste-water to chlorine.

Gwaltney knew that its plant had a chlorine problem prior to purchasing the plant from ITT-Gwaltney in October, 1981. ITT-Gwaltney had taken the initial step of purchasing a new chlorinator, which Gwaltney believed would correct the chlorine and fecal violations. After a period of nearly one year from the takeover date, Gwaltney finally resolved the chlorination problems at its plant. At no time did Gwaltney seek outside assistance from independent consultants in analyzing the causes or the extent of its chlorination problems.

a. *Economic benefits.* The Court first considers the economic benefits that accrued to Gwaltney as a result of the delay in the plant's having a chlorination system that would meet the chlorine and fecal coliform limitations. The Court feels compelled to ensure that Gwaltney receives no economic benefit whatever from its delay in having a properly operating chlorination system.

Determining with precision a firm's economic benefit from noncompliance is not a simple matter. As EPA's penalty policy points out, there are at least three distinct types of economic benefits that a violator may enjoy as a result of its violation. *See* EPA Penalty Policy at 41:2996-97. First, by delaying the expenditure of funds on compliance, a violator obtains the use of the money for other purposes in the meantime. Second, a violator may also avoid some costs altogether—for example, the costs of maintaining and operating the pollution control system until it is implemented. Third, a violator may, in addition, obtain a competitive advantage as a result of its violation—for example, it may be able to offer goods at a lower price, thereby possibly increasing its sales and profits. While these different types of benefit are not difficult to understand in the abstract, determining their amounts is more complicated. Indeed, proving the extent of some of these types of economic benefits will often be impossible; thus, any objective formulation of economic benefits is likely to underestimate that benefit. The Court need not painstakingly determine such an amount, however. The purposes behind including an economic benefit component in a penalty assessment are to ensure that the violator disgorges at least its economic benefit, while also providing some objective basis for at least part of the penalty assessment. In light of these purposes and the difficulty of demonstrating all elements of economic benefit, the Court shall incorporate any objective evidence to arrive at what it hopes is a rational estimate of Gwaltney's economic benefit, resolving uncertainties in favor of a higher estimate.

Gwaltney offered evidence addressing primarily the first type of economic benefit: the benefit accruing from delaying its expenditures. Gwaltney indicated that its net cost for the changes in the chlorination system was $11,560. This amount is undisputed. In order to determine Gwaltney's economic benefit from delaying its expenditure, one must also know the length of the delay and the value of not incurring that expenditure.

Gwaltney attempted to demonstrate at trial that it could not have implemented the necessary improvements in the chlorination system any more than four months earlier than it actually did. Gwaltney argues that its economic benefit from delay should therefore be computed based on this four-month period. The Court, however, believes that the period of benefit for computing the economic benefit of delayed compliance should run for the entire time during which the violator is out of compliance because of its chlorination problems: here, twelve months. The Court recognizes, of course, that Gwaltney could not have accomplished the necessary changes instanteously upon discovering the chlorination problems. Indeed, Gwaltney's suggestion that six months was an appropriate, reasonable period for implementing a fully complying chlorination system may be correct. But this does not change the fact that if the expenditures had been made in time to prevent any violations at all, then Gwaltney would have incurred all the expenditures prior to the noncompliance period.[14] The Court also notes that its approach for computing the benefit period comports with that of the EPA's penalty policy. *See* EPA Penalty Policy at 41:2996.

Gwaltney argues that its actual rate of interest on borrowed funds during this period should be used to

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[14] The fact that in the circumstances of this case another firm —ITT-Gwaltney, rather than defendant—owned the plant at the time such expenditures would have been incurred does not alter this conclusion. Presumably the cost of such improvements would have been reflected in the sale price that defendant would have paid for the plant.

calculate its economic benefit from delayed compliance. It adduced evidence that during the relevant period this rate was 13%. Plaintiffs, on the other hand, computed Gwaltney's economic benefit from delay using a rate of 18.17%, which is the ten-year rate of return on equity earned by Smithfield Foods, Inc.—Gwaltney's parent corporation. At least in these circumstances, the Court believes that 13%—the actual interest rate Gwaltney itself paid on borrowed funds—is a more accurate basis for determining Gwaltney's economic benefit from delay.[17]

Given Gwaltney's rate of interest, its period of delay compliance because of chlorination problems, and the amount of investment involved, the Court can determine at least the portion of economic benefit accruing to Gwaltney because of the delay in expending funds on the chlorination system. That amount is approximately $1,500.[18] While this amount is probably less than Gwalt-

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[17] Plaintiffs cite *Ohio ex rel. Brown v. Dayton Malleable, Inc.*, 13 E.R.C. 2189, 2194 (Ohio Ct. C.P. 1979), *aff'd*, 438 N.E. 2d 120 (Ohio 1982), for the proposition that the historic return on equity is the appropriate rate. But in that case, which involved penalty assessments under an Ohio water pollution statute, apparently no one contended that the defendant's own rate of interest ought to be used. Rather, the choice before the Court was between the polluter's actual rate of return and "some outside standard." *Dayton Malleable*, 13 E.R.C. at 194. The Court rejected the latter. Here, plaintiffs' proposed rate—not the rate proposed by Gwaltney—is more accurately described as the "outside standard": it is based on the parent's rate of return; not Gwaltney's; and it runs over a ten-year period, not the years in question.

[18] Gwaltney's annual rate of return (13%) multiplied by the amount of investment involved ($11,560) multiplied by the number of years of non-compliance (1.0).

In its proposed calculations, Gwaltney, like the Court, calculates its benefit from delay on the entire amount of investment involved: $11,560. Gwaltney claims that this is a generous concession on its part, because the money was actually expended over the course of the improvements, which while the calculation is based on the fiction that the money was spent in a lump sum at the end of the improvements—facilitating the computation but distorting the reality. The

ney's total economic benefit, the Court has no basis for rationally arriving at a figure any larger. In view of the rest of the penalty that Gwaltney shall be assessed, however, the Court has no doubt that Gwaltney shall disgorge any economic benefit of its non-compliance.

b. *Gravity component.* Gwaltney argues that there is no reason to impose a penalty with an adjusted gravity component of more than $4,900. Gwaltney's suggested gravity component covers all the violations at issue in this case, including its violations resulting from its chlorination problems.

The actual and potential environmental harm associated with a violation is an important factor, under the EPA's penalty policy, in arriving at the gravity component. *See* EPA Penalty Policy at 41:2999. The Court agrees. In connection with the environmental harm of its fecal coliform violation, Gwaltney recognizes that the presence of fecal coliform has led the state to generally prohibit the taking of shellfish for human consumption from much of the Pagan River. Gwaltney attempts to minimize the seriousness of its fecal coliform violations, however, by pointing out that the state—in certain circumstances—nevertheless allows oysters and clams from those same parts of the Pagan River to be sold for human consumption in their uncooked state. Further, Gwaltney argues that the Pagan River's condition with respect to fecal coliform could not be improved for shellfish harvesting even if Gwaltney constantly complied with the fecal coliform limitations in its permit. Gwaltney also attempts to minimize the seriousness of its fecal coliform violations by noting that the State has not abso-

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Court agrees that a fiction is involved, but disagrees that it distorts Gwaltney's economic benefits from delay. If the expenditures had been incurred in time to improve the system before the violations occurred, it is reasonable to presume that each of the expenditures would have been incurred about a year before it was actually incurred. Thus, it is appropriate to calculate Gwaltney's benefit on the entire amount expended based on one year's time.

lutely forbidden the discharge of fecal coliform; rather, the State has only limited such discharge.

In the Court's view, Gwaltney trivializes the seriousness of its fecal coliform violations. To begin with, an EPA summary of the effects of the fecal coliform indicates that increased levels of fecal coliform in waters used for recreational swimming and shellfish harvesting pose health hazards to human beings, and act as a medium of disease transmission for a variety of diseases.[19] In light of this, the Court finds Gwaltney's characterization of is violations as posing "no threat whatever to the public health" to be nothing less than offensive.

Further, the Court notes that Gwaltney's fecal coliform violations were not *de minimus*. Gwaltney violated its daily maximum—by four to seven times the permitted amount—on at least six occasions, according to the DMRs; and during five out of the seven months when Gwaltney exceeded its monthly average for fecal coilform, it exceeded the monthly average by 58% to 150%. Finally, the Court notes that Gwaltney experienced fecal coliform problems almost continuously from November, 1981 to July, 1982. It is true, of course, that the Pagan River was not a virgin stream before Gwaltney exceeded its permit limitations for fecal coliform; Gwaltney's fecal coliform violations were not responsible for spoiling the river. But the fact that a river already suffers from poor water quality hardly excuses a polluter's violation. Indeed, in view of the fact that the Clean Water Act aims to restore the waters of the United States as well as to prevent the degradation of unpolluted waters, *see* 33 U.S.C. § 1251, violations that impede the restoration of water quality ought not to be treated lightly. Considering all these factors, the Court believes that the "gravity component" of Gwaltney's penalty should include $4,000 per day of fecal coliform violations arising

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[19] This EPA summary is a joint exhibit to which the parties stipulated.

out of Gwaltney's chlorination problems. A total of 213 days are involved.[26]

Gwaltney's problems with its chlorination system resulted in violations of its chlorine standards as well as of its fecal coliform standards. The parties have stipulated that at least half of Gwaltney's 34 chlorine violations involved minimum standards, however, not maximum ones. The only possible harmful environmental effect from violating a minimum chlorine standard, according to the evidence, is that fecal coliform limitations may be exceeded. The Court has already considered the environmental harm from Gwaltney's fecal coliform violations. It sees no reason to increase the gravity component because of Gwaltney's violations of its minimum chlorine standards.

Gwaltney's violations of its maximum chlorine standards are a different matter, though. Chlorine is a toxic pollutant, and in certain concentrations kills a variety of marine life. Gwaltney correctly points out that it is required to use chlorine in its waste-water treatment and has even been required to maintain a minimum level of chlorine in its effluent. Gwaltney also points out that apparently no fish kills on the Pagan River occurred during the entire period of its noncompliance. The Court nevertheless believes that a non-trivial amount should be added to the gravity component of Gwaltney's penalty to account for its chlorine violations. The gravity component should account for risk of environmental harm as well as for any actual environmental harm. During ten of the twelve months when Gwaltney experienced problems with its chlorination system, it exceeded its maximum chlorine limitations on some seventeen occasions. Although most

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[26] Gwaltney violated its monthly average for fecal coliform in November and December, 1981, and from February to June, 1982; it also violated daily maximums on one occasion in January, 1982 and on one occasion in July, 1982. This amounts to 213 days of violation.

of these violations were not grossly excessive,[21] two involved discharges that were double the permitted concentration. Considering these factors, the Court deems it appropriate to include in the gravity component of Gwaltney's penalty an amount of $1,000 for each of the seventeen days of violation of its maximum chlorine limitation.

3. *Adjustments.* Gwaltney argues that its penalty ought to be adjusted downward to account for a variety of factors. Under EPA's civil penalty policy, a violator's willfulness or negligence—or lack thereof—is one factor to consider in arriving at a final penalty amount. *See* EPA Penalty Policy at 41:3000. Of course, liability under Section 1319(d) is strict. *See, e.g. United States v. Amoco, supra*, 580 F. Supp. at 1050. But willfulness is nevertheless relevant to the amount of penalty. *See id.*

Gwaltney argues that its conduct should not be characterized as willful merely because it did not shut down its facility in the face of admitted knowledge that chlorination problems at its plant were causing permit violations even before Gwaltney took over the plant. In support of that proposition, Gwaltney suggests that it had no "absolute statutory obligation" to close its plant or slow its production, absent "imminent and substantial endangerment to health or welfare." Gwaltney's premise does not support its conclusion, however. Even if it had no "absolute statutory obligation" to close its plant or slow its production, Gwaltney's failure to take any such measures, in the face of undisputed knowledge that continued operation would result in continued violations, reflects a certain degree of willfulness. The Court need not decide whether it is the sort of willfulness that ought to result in an increased penalty, though, because the evidence reflects that Gwaltney dealt with its chlorination

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[21] Gwaltney's permit allowed discharges with a maximum chlorine concentration of 2.5 mg./l. and a minimum of 1.5 mg./l. It appears that 11 of Gwaltney's 17 violations of its maximum chlorine limitations involved discharges with a chlorine concentration under 3.2 mg./l.

problems in an exceedingly unconcerned manner. While Gwaltney may not have had any control whatever in the chlorination problem's first arising, it did exercise considerable control over the time involved in correcting that problem, and its attitude borders on benign neglect.

The first shipment of parts for the new chlorinator that Gwaltney believed would solve its problems did not arrive until December, 1981; yet, the problem had arisen in August, and ITT-Gwaltney had ordered the parts in September. The record does not reflect any effort by Gwaltney to speed up the arrival. A crucial component for maintaining the proper chlorine flow—an automatic valve—was missing from the December shipment and had to be back-ordered; this part did not arrive until March 16, 1982. The record does not reflect any efforts by Gwaltney to speed up this arrival, either. Every witness who was asked indicated that the chlorination problems arising from the lack of an automatic valve could have been handled manually. It would not have been easy—but it was possible. The record does not reflect any special effort by Gwaltney to control the problem manually. Further, Gwaltney's engineers suspected—correctly, as it turned out—other problems with the chlorination system besides the chlorinator itself. A supplier first sent the wrong dyes for testing those suspicions. Gwaltney did not obtain the proper dyes until ten days later, despite virtually uncontradicted testimony that the necessary dye is commonly available. Through all this, Gwaltney did not seek any outside advice to assist it in determining the precise nature and extent of its chlorination problems.

Contrary to Gwaltney's contentions, the Court believes that Gwaltney's penalty ought to be increased, not reduced, because of willfulness. Gwaltney's lackadaisical approach in correcting a problem that posed risks—albeit not "imminent" ones—to both human health and aquatic life should not be countenanced. One may speculate how long Gwaltney would have taken to repair a machine the faulty operation of which would have halted production.

It is reasonable, in the Court's view, to conclude that at the very least Gwaltney would have exerted more effort to repair such a machine than it did to bring its discharges into compliance with pollution standards. Gwaltney acknowledges that the evidence supports the conclusion that it could have reduced the compliance time by 125 days. The Court agrees, and shall increase the penalty by $1,000 per day that Gwaltney could have eliminated in correcting the problem.

Gwaltney argues that its penalty should also be reduced because of its cooperation in controlling its chlorination problem.[22] It is apparently true that Gwaltney corrected its chlorination problems without the threat of a lawsuit from anybody to prod it along. In that sense, Gwaltney was not uncooperative. But the Court finds it inappropriate to give Gwaltney credit for correcting violations for which Gwaltney plainly knew it was responsible.

Gwaltney's final argument for reducing any penalty it will be assessed is its purported inability to pay a substantial penalty. EPA's penalty policy is, generally, not to request a penalty that is "clearly beyond the means of the violator." *See* EPA Penalty Policy at 41:3002. Gwaltney characterizes its own "profit margin" as "extremely thin." It suggests that its penalty should be fashioned in light of this fact. The Court disagrees, being unpersuaded that any penalty warranted by Gwaltney's violations would jeopardize Gwaltney's continued operation.[23]

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[22] Gwaltney also suggests that its cooperation is reflected by its self-reporting of violations, and intimates that under EPA's penalty policy this should result in a mitigation of its penalty. Gwaltney is legally required to report its violations, however *see supra* note 3. Thus, the Court shall not mitigate Gwaltney's penalty on account of its self-reporting. This approach accords with EPA's policy. *See* EPA Penalty Policy at 41:3000 ("*assuming such self-reporting is not required by law*, such behavior should result in the mitigation of any penalty.") (emphasis added).

[23] Although Gwaltney's income statement for the year ending April 29, 1984, reflects an after-tax loss of $247,000, this loss must

In light of Gwaltney's economic benefit, the gravity component, and appropriate adjustments, Gwaltney's total penalty for the violations arising out of its chlorination problems is $995,500.[24]

2. *Biological treatment system.* Gwaltney's second source of compliance problems was its biological treatment system. Inadequacies in that system led to repeated violations of Gwaltney's TKN limitations during the winter months early in 1982 and the winter months of 1982-83. Gwaltney also experienced violations of its permit limitations for TKN and other substances during the winter and spring of 1983-84, in connection with the start-up of its new biological treatment system.

TKN is a nitrogen compound that can degrade a river by depleting its oxygen supply. Natural chemical and biological processes, involving TKN and bacteria in the river, transpire after TKN is added to a river. Those processes consume the dissolved oxygen in a river, to the detriment of many forms of river life. Gwaltney knew before it purchased the plant that its biological treatment system had resulted in TKN violations the previous winter. It did not take any steps of its own to address the problem until late May, 1982—well after it experienced TKN violations during the first winter that it was

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be considered in light of Gwaltney's extraordinary loss during the same year of 1.8 million dollars on the disposition of a plant. Gwaltney is clearly earning a substantial dollar amount on its operations, regardless of whether its profit margin is "thin."

[24] This amount is computed as follows:

—economic benefit:	$ 1,500
—gravity-fecal coliform ($4,000 x 213 days of violation):	852,000
—gravity-chlorine ($1,000 x 17 days of violation of maximum limit):	17,000
—adjustment for delay ($1,000 x 125 days of delay):	125,000
	$995,500

operating the plant. Over the following two years, in conjunction with the advice and approval of a consulting firm and the State Water Control Board (SWCB), Gwaltney devised and implemented a variety of changes in its biological treatment system. It submitted a proposed plan to the SWCB on January 5, 1983, which the SWCB approved on May 31 of the same year. By mid-October, construction was completed. Although Gwaltney experienced a number of violations during the system's start-up period, it experienced no violations after May 15, 1984, up to the time of trial in mid-December, 1984. Some experts did testify, though, that they were uncertain whether the new system would meet the permit limitations for TKN during the remainder of the winter.

a. Economic benefit. As with its chlorination system, the only evidence about Gwaltney's economic benefit from non-compliance concerns the value of delaying the necessary expenditures. Gwaltney's evidence is that its expenditure amounted to $159,745. The Court's computation of Gwaltney's economic benefit shall be based on this amount.[25]

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[25] Plaintiffs argue that Gwaltney's benefit from delayed expenditures should be based on a much larger amount. They point out that Gwaltney's consultants outlined a "permanent solution" to Gwaltney's biological treatment problems, at an estimated cost of $506,000, and that Gwaltney chose instead to implement a modified version of the "interim solution," which was considerably less expensive. Plaintiffs argue that Gwaltney's economic benefit constitutes the difference between the "permanent solution" and the amount Gwaltney actually expended.

This aproach is incorrect. Gwaltney's benefit from delaying expenditures is the benefit from delaying those expenditures that are necessary to achieve compliance. Gwaltney appears to have achieved compliance on the expenditures it has already incurred on its biological treatment system.

Although some of the testimony suggests that the modifications Gwaltney made in its treatment may not result in compliance with its TKN limitations, the Court believes it would be too speculative to reach that conclusion on the present record.

The period over which a violator's economic benefit should be computed runs from the date of non-compliance until the date of compliance, or the date on which compliance may reasonably be expected, as discussed above. The compliance problems arising out of the plant's biological treatment system commenced, for Gwaltney, in January 1982. They were not rectified until May 15, 1984.[26] This is a period of two years and over four months, or 2.37 years.

The rate at which Gwaltney benefited from the delay, as discussed *supra*, is 13%. Given such a rate, as well as the amount of expenditures involved and the period of benefit, Gwaltney's benefit from delaying expenditure is $54,022.[27]

b. *Gravity component.* As mentioned *supra*, in connection with chlorination problems, Gwaltney argues that the gravity component of its penalty for all its violations, including those caused by its biological treatment system, should not exceed $4,900, when adjusted. With respect to the numerous TKN violations resulting from the problems with its biological treatment system, Gwaltney argues that the great majority were utterly innocuous from an environmental standpoint because TKN is not

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[26] The Court is aware that the evidence raises some question whether Gwaltney had permanently corrected its TKN problems by May 15, 1984, even though it experienced no further violations after that date; or whether instead Gwaltney would again experience TKN violations during the coldest winter months. As indicated *supra* note 21, the Court believes that such a conclusion would be too speculative, given the present record.

[27] This amount is based on yearly compounding, computed as follows:

1982: $159,745 x .13/yr x 1 yr =	$20,767
1983: ($159,745+$20,767) x .13/yr x 1 yr =	23,467
1984: ($159,745+$20,767+$23,467) x .13/yr x .37 yr =	9,811
TOTAL:	$54,045

toxic, because the Pagan River is improving, and because most of the discharges occurred in the wintertime.

Some of its points are relevant to penalty considerations, although Gwaltney overstates its case. Gwaltney correctly points out that the presence of TKN in a river does not affect human health, according to the evidence. But it does have undeniable implications for the river's dissolved oxygen content, which is related to the environmental quality of the river.[28] While none of the evidence reflects specific environmental damage resulting from Gwaltney's TKN violations, the Court does not believe that it should blind itself to those violations as a result.

Nor does the Court believe that Gwaltney's penalty should be mitigated because the Pagan River's condition is generally improving. Gwaltney's violations may have contributed to delaying that improvement. Compliance incentives would be undermined if polluters believed that their violations would not be treated seriously where environmental regulations have generated some improvement in the environment.

The Court does recognize, however, that Gwaltney's TKN violations during the winter months posed less environmental risk than summer violations. The process by which TKN depletes the river's oxygen slows down substantially with the colder winter temperatures. Plaintiffs point out that the Pagan River's tidal nature may inhibit the flushing of TKN from the river—raising the possibility that even winter TKN discharges may lead to oxygen depletion during the warmer months. Neverthe-

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[28] Gwaltney also suggests that its TKN discharges have little effect on the environment because of the point on the Pagan River at which they occur. Testimony did indicate that the discharges are slightly down-river from a "critical point" for dissolved oxygen in a SWCB pollution model. But testimony also indicated that tidal action could nevertheless result in Gwaltney's TKN discharges affecting that critical point upriver. Further, even if Gwaltney's TKN discharges do not affect the critical point, there is no evidence that they have no potentially adverse environmental impacts on other points in the river.

less, the risk is certainly diminished. In the Court's view, fairness dictates that Gwaltney's winter TKN violations should be treated less harshly than its summer TKN violations. An appropriate penalty is $250 per day of violation for TKN violations during the months of November through April. For violations during the remaining months of the year, a penalty of $1,000 per day of TKN violation is appropriate.

c. *Adjustments.* An important factor is the willfulness involved in a compliance problem. Gwaltney concedes that it could have begun addressing the problems in its biological treatment system substantially earlier. One major delay was that Gwaltney did not contact a consultant immediately upon experiencing unexpected TKN compliance problems in the winter of 1981-82; rather, it waited until late May, 1982, to do so. Gwaltney has submitted evidence that this—and other unnecessary delays it could have prevented—totaled 283 days. The Court concludes that this number is a reasonable approximation.

Gwaltney's penalties should be adjusted upward for each day of these controllable delays, just as its penalties were adjusted upward for the controllable delays in implementing a properly functioning chlorination system. The adjustment should not be as substantial, however, because the violations resulting from the problems in the biological treatment system appear to be less serious than those resulting from the chlorination problems. Further, there do not appear to be any human health implications from the poorly functioning biological treatment system, unlike the situation with the malfunctioning chlorination system. In the Court's view, this makes the controllable delays in implementing a properly functioning biological treatment system less culpable. The Court concludes that an amount of $250 per day of delay in addressing the problems with the biological treatment system is an appropriate adjustment to the penalty.

The Court believes that Gwaltney's penalty should be adjusted downward as well as upward due to the amount of willfulness involved in the violations arising out of its biological treatment system. According to the evidence, Gwaltney's violations after starting up its new system were largely uncontrollable; there is no way to start up a biological treatment system without violations. A biological treatment system is apparently the best sort of system, overall, for a plant such as Gwaltney's. There is no evidence that Gwaltney's start-up period was greater than one would expect. The Court shall therefore account for the violations of Gwaltney's various permit limitations during its start-up period by assessing $50 per day per violation of the limitations on any substance, instead of the higher amounts discussed *supra*.

As indicated in the Court's discussion of Gwaltney's chlorination problem, Gwaltney also seeks to have its penalty adjusted downward to account for its cooperation in resolving its problems prior to litigation, and for its purported inability to pay. The Court has already rejected those arguments *supra*, and it need not address them again here.

In light of the foregoing discussion, Gwaltney's penalty for the compliance problems stemming from its biological treatment system is $289,822. Appendix B elaborates the computation of this amount.

CONCLUSION

Having determined that Gwaltney shall be assessed a civil penalty of $289,822 for violations arising out of the problems with its biological treatment system, as well as $995,500 for violations arising out of its chlorination system, the Court shall impose upon Gwaltney a total civil penalty of $1,285,322.

An appropriate order will issue.

/s/ [Illegible]
United States District Judge

Date June 26, 1985

APPENDIX A

Gwaltney's Violations of NPDES Permit No. VA0002844 (based on DMRs and stipulation of parties), from November 1, 1981 to August 31, 1984.

Month	Substance Involved and Limitation Violated								
	Total Suspended Solids (TSS)		Total Kjeldahl Nitrogen (TKN)		Fecal Coliform (FC)		Oil and Grease (O/G)	Chlorine (Cl_2)	
	(mo. avg.)	(day max.)	(mo. avg.)	(day max.)	(mo. avg.)	(day max.)	(day max.)	(day min.)	(day max.)
11/81	—	—	—	—	1	1	—	1	1
12/81	—	—	—	—	1	1	—	1	1
1/82	—	—	1	5	—	1	—	1[b]	6[a]
2/82	—	—	1	10	1	3	—	—	3
3/82	—	—	1	4	1	3	—	1	1
4/82	—	—	—	—	1	3	—	6	—
5/82	—	—	—	—	1	3	—	1[b]	[illegible]
[late May/82: Gwaltney contacts consulting firm about its TKN problems.]									
6/82	—	—	1	—	1	3	—	1	1
7/82	—	—	—	—	—	1	—	1	—
8/82	—	—	—	—	—	—	—	1	1
9/82	—	—	—	—	—	—	—	1	1
10/82	—	—	—	—	—	—	—	1	1
11/82	—	—	—	—	—	—	—	—	—
12/82	—	—	1	—	—	—	—	—	—

[1/5/83: Gwaltney submits plan for improving its biological treatment system to the State Water Control Board (SWCB).]									
1/83	—	—	1	—	—	—	—	—	—
2/83	—	—	1	4	—	—	—	—	—
3/83	—	—	1	—	—	—	—	—	—
4/83	—	—	1	—	—	—	—	—	—
5/83	—	—	1	1	—	—	—	—	—
[5/31/83: SWCB approves Gwaltney's plan.]									
6/83	—	—	—	—	—	—	—	—	—
7/83	—	—	—	—	—	—	—	—	—
8/83	—	—	—	—	—	—	—	—	—
9/83	1	—	1	—	—	—	—	—	—
10/83	—	—	1	8	—	1	—	—	—
[10/18/83: Gwaltney's new biological treatment system is completed.]									
11/83	1	1	1	10	—	—	—	—	—
12/83	1	1	1	13	1	1	—	—	—
1/84	—	—	1	9	—	—	—	—	—
2/84	—	—	—	1	—	2	3	—	—
3/84	—	—	1	—	—	—	—	—	—
4/84	—	—	1	3	—	—	—	—	—
5/84	—	—	1	1	—	—	—	—	—
7/84	—	—	—	—	—	—	—	—	—
8/84	—	—	—	—	—	—	—	—	—
TOTAL	3	2	18	69	8	23	3	16[b]	18[a]

[a] at most this number of violations of the maximum chlorine standard.

[b] at least this number of violations of the minimum chlorine standard.

APPENDIX B

Penalties for Gwaltney's violations arising from its inadequate biological treatment system.

—*economic benefit*:	$ 54,022
—*gravity component*:	
—pre-start-up TKN violations	
• winter '81-'82: 90 days x $250/day =	22,500
• summer '82: 30 days x $1,000/day =	30,000
• winter '82-'83: 151 days x $250/day =	37,750
• summer '83: 61 days x $1,000/day =	61,000
—start-up violations: (including downward adjustment because start-up is involved)	
296 days (199 days TKN, + 61 days TSS, + 33 days fecal coliform, + 3 days oil & grease) x $50/day =	14,800
	166,050
• *further adjustments*:	
• delay: 283 days x $250/day =	70,750
TOTAL:	$289,822

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, *et al.*,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[Filed June 26, 1985]

JUDGMENT ORDER

For the reasons stated in the memorandum of the Court this day filed and deeming it proper so to do, it is ADJUDGED and ORDERED as follows:

Defendant's motion to dismiss be and the same is hereby denied.

Defendant Gwaltney of Smithfield, Ltd., is declared to have been in violation of the Clean Water Act, 33 U.S.C. § 1311 and 1342.

Defendant is mandatorily enjoined until the further order of the Court to provide plaintiffs with a copy of all reports said defendant submits to state or federal government relating to its NPDES permit. Said reports are to be submitted to plaintiffs simultaneously with each filing.

Defendant shall pay civil penalties in accord with the Court's memorandum in the sum of $1,285,322 with interest from this day forward; counsel for the respective

parties shall meet and confer within ten (10) days of this date in an effort to agree on appropriate counsel and litigation fees to be paid by the defendant to the plaintiffs. Failure to reach agreement will result in the Court's setting such fees and litigation costs as are warranted and supported by affidavits. In the event of failure to agree, appropriate affidavits should be filed with the Court no later than twenty (20) days from this date.

Let the Clerk send copies of this order and the accompanying memorandum to all counsel of record.

/s/ [Illegible]
United States District Judge

Date June 26, 1985

Supreme Court, U.S.
FILED
MAR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-473

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,

and

NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Did the court below err in holding that citizen suits may be brought under the Clean Water Act seeking penalties for purely past violations, contrary to the holding of the Fifth Circuit in *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (1985)?

PARTIES TO THE PROCEEDINGS

Petitioner and defendant-appellant below Gwaltney of Smithfield, Ltd., is a wholly-owned subsidiary of Smithfield Foods, Inc.* Respondents and plaintiffs-appellees below are Chesapeake Bay Foundation, Inc., and Natural Resources Defense Council.

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* *Statement pursuant to Supreme Court Rule 28.1*: The Smithfield Packing Company, Incorporated, Patrick Cudahy Incorporated, and Schluderberg-Kurdle Co., Inc. ("Esskay"), are also subsidiaries of Smithfield Foods, Inc.

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---

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 791 F.2d 304 and is reprinted in the appendix to the petition for certiorari ("App.") at 1a.

The opinion of the District Court for the Eastern District of Virginia (Merhige, J.) is reported at 611 F. Supp. 1542 and is reprinted in the joint appendix ("JA") at 71.

JURISDICTION

Respondents brought suit in the District Court on June 15, 1984, alleging jurisdiction under 33 U.S.C. § 1365(a)(1). App. 79a. Petitioner filed a motion to dismiss for lack of subject matter jurisdiction on May 16, 1985, which was denied by the District Court on June 26, 1985. JA 69, 119.

Petitioner appealed, and the Court of Appeals affirmed on May 22, 1986. App. 75a. A timely-filed petition for rehearing was denied on June 26, 1986. App. 77a.

The petition for a writ of certiorari was filed on September 23, 1986, and was granted on January 12, 1987. 107 S. Ct. 872. The time for filing the brief for petitioner was extended to and including March 28, 1987. Rule 29.4. The jurisdiction of this Court to review the judgment of the Fourth Circuit rests upon 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

Section 505 of the Clean Water Act, 33 U.S.C. § 1365, provides in pertinent part:

> Citizen Suits
>
> (a) Authorization; jurisdiction
>
> Except as provided in subsection (b) of this section, and section [1319(g)(6) of this title], any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the

case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

STATEMENT OF THE CASE

Petitioner Gwaltney of Smithfield, Ltd. ("Gwaltney"), operates a meat packing plant on the Pagan River near Smithfield, Virginia. Normal meat packing operations generate non-toxic organic wastes that must be treated before discharge. Gwaltney discharges treated effluent into the River under a permit issued by the Virginia State Water Control Board ("the Board") pursuant to the Clean Water Act ("the Act"), 33 U.S.C. § 1342. The

permit imposes limits on the discharge of various substances.

Gwaltney's parent corporation, Smithfield Foods, Inc., acquired Gwaltney on October 27, 1981 from ITT-Continental Baking Company, which had originally received the Board's permit in 1974. At the time of the acquisition, Smithfield Foods received assurances from the seller that previous difficulties with the wastewater treatment system at the plant had been identified and corrected.[1] In fact, pre-existing deficiencies in the system resulted in violation of the limits in Gwaltney's permit. As Gwaltney itself reported in its discharge monitoring reports ("DMRs"), it exceeded the limits for fecal coliform/chlorine and total Kjeldahl nitrogen ("TKN") on specified occasions between October 27, 1981, and May 15, 1984.[2]

The first problem arose with the plant's chlorination system. Gwaltney was required by its permit to add chlorine to the effluent prior to discharge in order to control bacteria known as fecal coliform. Such a system must maintain a delicate balance: too little chlorine would result in exceeding the fecal coliform limit, while too much chlorine would successfully kill the fecal coliform but exceed a limit on the amount of chlorine itself. Proper functioning of the system depends upon a complex interplay between the amount of chlorine, the volume of effluent flow, and the retention time in the treatment tank necessary for the chlorine to take effect.

Gwaltney corrected the inherited flaws in the existing chlorination system by installing a new automatic chlorinator to replace the manually-operated system, install-

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[1] *See* Transcript of Proceedings at 156-157, 201.

[2] Permits issued under the Clean Water Act require the permit holder to monitor effluent discharges and determine what amounts of the substances listed in the permit are discharged. The results must be reported to the responsible regulatory authority—in this case the Board—on DMRs. *See* 40 C.F.R. § 122.41(l)(4) (1986). The DMRs are public information. 33 U.S.C. § 1318(b)(2).

ing baffles and sealing off multiple discharge points to increase retention time in the treatment tank, and replacing much of the chlorination equipment, piping, and wiring. *See* App. 90a-91a.[3] These efforts were completely successful. The last chlorine violation occurred in October 1982, twenty months before suit, and the last fecal coliform violation—other than isolated exceedences caused by the start-up of Gwaltney's new treatment system for TKN—occurred even earlier, in July 1982. *See* JA 110, 115-117.[4]

The second problem involved TKN, a measurement of the ammonia and organic nitrogen in the effluent. Bacteria found in all natural streams consume these substances and, in the process, consume dissolved oxygen, with adverse effects on aquatic life. The process is known as nitrification. App. 95a. TKN is controlled by subjecting the effluent to biological treatment in open-air lagoons. Essentially, nitrification occurs in the lagoons prior to discharge into the natural stream.

The first violations of TKN subsequent to Gwaltney's acquisition of the plant in October 1981 did not occur until three months later, in January 1982. JA 116.[5]

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[3] The parties stipulated, for example, that Gwaltney "replaced the main pump for the chlorine injector, the main controller, the chlorine control analyzer, all of the electrical wiring to the main effluent pumps, and much of the piping in the system * * *." App. 91a.

[4] The District Court recognized that the start-up exceedences were inevitable with the start-up of the system Gwaltney installed for TKN, "the best sort of system, overall, for a plant such as Gwaltney's." JA 115. In any event, the last start-up exceedence for fecal coliform occurred in February 1984, four months prior to suit. JA 117.

[5] Nitrification is affected by temperature. Biological activity slows as temperature drops, retarding nitrification. App. 93a. This occurs in the natural stream as well as the treatment lagoon, so that while violations are more likely in cold weather, they are less likely to cause environmental harm. *See* JA 47 ("what we are saying is that during the winter months, we don't believe that the violations that Gwaltney has been experiencing have adversely

After recognizing that the system was not completely treating TKN, Gwaltney undertook a major redesign of the facility. In light of the scope of the undertaking, Gwaltney retained an outside engineering firm and contacted the Board for advice and approval of its plans. After some delays beyond Gwaltney's control, including a six-month delay caused by the Board itself, *see* JA 38-41, 111, Gwaltney's new system was completed and achieved designed efficiency levels. The new system completely cured the TKN problems. As with fecal coliform, there were the unavoidable start-up exceedences, *see* JA 115, but, as the parties stipulated, the last TKN violation of any sort occurred on May 15, 1984. App. 86a, 87a, 93a.[6]

On June 15, 1984, however, respondents Chesapeake Bay Foundation and Natural Resources Defense Council filed suit against Gwaltney under the citizen suit provision of the Act, 33 U.S.C. § 1365. The suit was based on the permit violations reported by Gwaltney in its DMRs, which were appended to the brief complaint. App. 82a-83a. Respondents requested that the court declare Gwaltney "to have violated and to be in violation" of the Act, issue an injunction banning future violations, assess maximum civil penalties, and award attorneys fees—as well as witness and consultant fees—to respondents. App. 83a-84a.

Gwaltney did not contest the validity of its DMRs, and the District Court entered summary judgment on liabil-

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effected [sic] the water quality because during the winter dissolved oxygen in the river isn't critical") (T. Switzer, State Water Control Board).

[6] A DMR filed in October 1985—several months *after judgment* in the District Court—indicated an exceedence of the TKN limit at that time, an excusable "upset" caused by record flooding associated with Hurricane Gloria in September 1985. *See* 40 C.F.R. § 122.41(n) (1986). Gwaltney immediately reported the exceedence to the Board, conforming to the established procedures for handling such upsets. The Board appropriately did not take any action against Gwaltney for the excusable upset.

ity. JA 59.[7] The parties thereupon entered into a lengthy stipulation. Although the citizen suit provision authorizes suit against any person "alleged to be in violation" of limitations in a permit issued under the Act, respondents stipulated that the last violation by Gwaltney occurred on May 15, 1984, a full month prior to suit. App. 86a, 93a; *see* App. 6a n.7, 7a.

On May 16, 1985, Gwaltney moved to dismiss for lack of jurisdiction over the subject matter. JA 69. Gwaltney argued that the citizen suit provision is limited by its express terms, structure, and legislative history to actions brought to abate ongoing violations, and does not cover purely past violations. Since Gwaltney had cured the deficiencies in its treatment system and was in full compliance with the Act well before suit, the jurisdictional predicate for commencing a citizen suit—that the defendant "be in violation"—was not satisfied. On June 26, 1985, the District Court issued an opinion denying Gwaltney's motion and assessing a penalty against the company of some $1.3 million. JA 71.[8] It was the largest penalty ever assessed in a citizen suit.

Gwaltney appealed, and the court below affirmed. The court regarded the statutory language as "ambiguous" and felt compelled to "look beyond the language itself." App. 8a-9a. The court ruled that "an expansive reading of the jurisdictional grant" in the citizen suit provision

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[7] The court subsequently modified its order to limit Gwaltney's liability to violations occurring after October 27, 1981, when Gwaltney acquired the plant. JA 61.

[8] The court assessed penalties of approximately $1 million for fecal coliform/chlorine violations and $300,000 for TKN violations. JA 110, 115. The court imposed these penalties despite its recognition that any economic benefit to Gwaltney from the past violations was limited to $55,522, or less than five percent of the total penalty amount. JA 110, 112. Although the issue of the calculation of the amount of the penalties is not before this Court, the penalties imposed in this case demonstrate the extraordinary financial hazards companies will face, even after good-faith *and successful* efforts at compliance, if the decision below is allowed to stand.

was necessary to effectuate the policies underlying the Act. App. 12a. The court embraced such a reading because of its view that "a significant deterrent would be lost if citizen suits seeking civil penalties for past violations were not permitted." App. 10a. According to the court below, "[i]t can hardly be questioned that the EPA has authority to bring suit for civil penalties for purely past violations," and "the scope of citizen enforcement powers must, in this important respect, be viewed as coextensive with the enforcement powers of the EPA." App. 10a. The court dismissed statements in a decision of this Court "that might be read as limiting the scope of citizen suits" as "mere dicta" that it declined to follow, adopting instead a jurisdictional interpretation that it regarded as more consistent with "the importance of citizen suits as an enforcement tool." App. 16a, 12a. The court held that "citizen suits like the one at bar, seeking civil penalties for permit violations committed entirely in the past, are permitted under section [1365(a)]." App. 17a.

SUMMARY OF ARGUMENT

Citizen suits may be commenced under the Clean Water Act only against dischargers "alleged *to be in violation of*" the Act. 33 U.S.C. § 1365(a) (emphasis supplied). The plain language of the statute establishes an ongoing violation as a jurisdictional prerequisite to suit, and precludes citizen suits seeking penalties for purely past violations. A discharger whose violations have completely abated because he has remedied the underlying causes of past violations cannot be considered "to be in violation" of the Act, and accordingly a citizen suit may not be commenced against him.

Reading the citizen suit provision as written promotes the purposes Congress intended it to serve and is fully supported by the legislative history of the Act. Congress intended the citizen suit to be a limited supplement to government efforts to secure abatement of pollution. *See Middlesex County Sewerage Auth.* v. *National Sea*

Clammers Ass'n, 453 U.S. 1, 14, 17-18 (1981). The Act requires would-be citizen plaintiffs to notify government authorities and alleged violators sixty days prior to suit, to afford the government an opportunity to take action "to require compliance," 33 U.S.C. § 1365(b), and to afford the violator an opportunity to abate the violation. This structure presupposes the existence of an ongoing violation before a citizen suit may be maintained. Throughout consideration of the Act, Congress referred to citizen suits as abatement actions. While civil penalties may be awarded in such suits, they must be based on abatement of an ongoing violation, for the citizen suit provision "authorizes only prospective relief." *Middlesex County*, 453 U.S. at 6. When violations are not ongoing but have already completely abated, a citizen suit seeking penalties for the purely past violations does not serve the purpose intended by Congress.

Gwaltney's violations completely abated before suit was filed because it undertook—long before suit or notice of suit—substantial improvements in its treatment systems, completely curing the underlying causes of the past violations. Chlorination problems—which accounted for $1 million of the $1.3 million penalty—were fully resolved twenty months prior to suit. Gwaltney completed construction of a new treatment system for TKN in October 1983, eight months prior to suit, and the start-up violations associated with that new system—which the District Court recognized were inevitable—ceased one month before suit. JA 115. Such start-up violations cannot support the existence of an ongoing violation. Gwaltney was in full compliance with the Act when suit was filed and thus could not be considered "to be in violation" under the terms of the statute.

Ignoring the statutory language and permitting citizen suits for purely past violations would dramatically expand the nature of the citizen suit beyond a limited, supplemental abatement action and contribute to the burgeoning volume of such suits flooding the federal courts. There have already been over 65,000 permits

issued under the Act. The permits require dischargers themselves to report violations, and such reports—required to be made public—are generally sufficient to establish liability, as they were in this suit. The limits set in the permits presuppose some violations even under the best treatment systems, since EPA sets such limits with the recognition that 100 percent compliance is impossible. If citizen suits may be commenced for purely past violations, all that a citizen plaintiff need do is flip through the DMRs of any of the thousands of permit holders, find violations (including inevitable ones), and file suit seeking penalties of $25,000 per day, with every confidence of prevailing on liability and recovering all attorneys fees and expenses. There would simply be no reason *not* to sue, particularly since suit can be and often is used to secure a settlement benefiting the plaintiff, contrary to congressional intent that all penalties under the citizen suit provision go to the Treasury.

Such a result is clearly contrary to the limited role for citizen suits envisioned by Congress. These untoward consequences of ignoring the plain meaning of the statute cannot be avoided, as the Government has suggested, by having jurisdiction hinge simply on whether the plaintiff *alleges* that the permit holder is in violation. Jurisdictional allegations—if controverted—must be proved, and the burden of proof is on the plaintiff. Congress expressly limited jurisdiction over citizen suits to actions involving ongoing violations, and could not have intended that limitation to be rendered meaningless by mere allegations that cannot be sustained. In any event, there was no reasonable basis for an allegation that Gwaltney's violations were ongoing, since it had completely cured the problems that resulted in past violations well before suit.

ARGUMENT

I. The Plain Language of the Statute Limits Citizen Suits to Ongoing Violations

This Court has frequently reiterated that "the starting point for interpreting a statute is the language of the

statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).[9] In this case, both the plain language of the citizen suit provision and the legislative intent behind it demonstrate that Congress limited citizen penalty actions to cases involving ongoing violations of the Act.

The citizen suit provision specifies that "any citizen may commence a civil action * * * against any person * * * who is alleged *to be in violation of*" a standard or limitation under the Act. 33 U.S.C. § 1365(a) (emphasis supplied). Quite simply, if the violation alleged in the complaint ceased prior to suit, the defendant cannot be considered "to be in violation" at that time.[10] Permitting citizen suits for purely past violations would require this Court to rewrite the Act to provide for actions against any person alleged "to be *or to have been* in violation of" the Act. By its express and plain terms, the citizen suit provision is limited to ongoing violations that have not abated by the time suit is filed. *See Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392, 395 (5th Cir. 1985) ("By its ordinary meaning the language of section 1365 requires an allegation of an ongoing violation").

As the First Circuit noted in *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F.2d 1089, 1092 (1986), *petition for cert. filed*, No. 86—— (March 17, 1987), "it would have been so easy for Congress to have said

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[9] *See United States* v. *James*, 106 S. Ct. 3116, 3121 (1986); *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 106 S. Ct. 681, 686 (1986); *Garcia* v. *United States*, 469 U.S. 70, 75 (1984).

[10] As we discuss below, the word "alleged" can have little if any legal significance apart from the phrase it modifies, "to be in violation." Where jurisdiction is demonstrably lacking, or where a lack of jurisdiction can be demonstrated by minimal proof, a mere allegation cannot supply what does not exist. To hold otherwise would force a trial court to ignore the facts before it and give pivotal significance to a few words the plaintiff has inserted, without basis, in his complaint. *See infra* at 37-43.

'has violated,' instead of 'is * * * in violation' if the former was its intention, and with the difference being so conspicuous." [11] Congress chose to limit citizen penalty actions to those cases in which the permit holder is "in violation." If that provision is to be changed, "it should be by Congress and not by this Court." *United States* v. *James*, 106 S. Ct. at 3125. Gwaltney's violations were not ongoing but rather were completely abated before respondents filed suit. Not only had the violations ceased but the underlying causes of the violations—the inherited inadequacies in the chlorination and biological treatment systems—had been completely cured. Respondents thus failed to satisfy the jurisdictional prerequisite that the defendant "be in violation" before commencing their citizen penalty action.

It is particularly important to adhere to the plain language of statutory enactments conferring jurisdiction on the federal courts. These are courts of limited jurisdiction, and have only such jurisdiction as is conferred by Congress. This Court has recognized its " 'duty * * * to see to it that the jurisdiction of the [district court], which is defined and limited by statute, is not exceeded.' " [12]

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[11] Congress knows how to provide for citizen suits seeking civil penalties for purely past actions when it wants to. To cite an example from the environmental area, the Solid Waste Disposal Act, 42 U.S.C. § 6972(a)(1)(B), authorizes citizen suits "against any person, * * * including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." Since Congress unambiguously authorizes citizen penalty suits for purely past actions when it intends them, this Court should not discern such an intent when, as here, the plain language of the statute not only does not authorize such suits but in fact precludes them. *See Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 21-22 & n.13 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 572 (1979).

[12] *Sumner* v. *Mata*, 449 U.S. 539, 548 n.2 (1981) (quoting *Louisville & Nashville Railroad Co.* v. *Mottley*, 211 U.S. 149, 152 (1908)).

Congress did not simply grant private citizens a cause of action in federal court whenever they were aggrieved by a violation of the Act, but carefully defined and limited the grant of jurisdiction. For example, Congress specified that no citizen suit may be commenced prior to sixty days after the citizen plaintiff notifies the EPA, the State, and the alleged violator of an intent to sue. 33 U.S.C. § 1365 (b). Congress further provided that no such suit may be maintained if the EPA or the State takes enforcement action. *Id.* Congress authorized citizens to sue the Administrator for failure to perform an act or duty under the Act, but only if the act or duty is not discretionary. *Id.* § 1365(a)(2). These various limitations have been interpreted as jurisdictional bars to commencement of a citizen suit.[13] Congress also specified that a private citizen may commence a civil action only against a person alleged "to be in violation" of the Act. The statutory requirement of an ongoing violation, like the other limitations on citizen suits, is a jurisdictional prerequisite that must be met before a citizen suit may be maintained.

The Court has also emphasized the importance of adhering to the plain language of this particular statute. As Judge Wisdom has noted, "[t]he Supreme Court has demanded strict adherence to statutory provisions for citizens' suits in environmental litigation." *Garcia* v. *Cecos International, Inc.*, 761 F.2d at 81. As the Court observed

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See Boelens v. *Redman Homes, Inc.*, 748 F.2d 1058, 1067 (5th Cir. 1984) ("statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction").

[13] *See, e.g., City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1014 (7th Cir. 1979) (notice provision), *cert. denied*, 444 U.S. 1025 (1980); *Walls* v. *Waste Resource Corp.*, 761 F.2d 311, 317 (6th Cir. 1985) (same); *Garcia* v. *Cecos International, Inc.*, 761 F.2d 76, 81-82 (1st Cir. 1985) (identical notice provision in Resource Conservation and Recovery Act); *Sierra Club* v. *Train*, 557 F.2d 485, 491 (5th Cir. 1977) (discretionary duty of Administrator); *Connecticut Fund for the Environment* v. *Contract Plating Co.*, 631 F. Supp. 1291 (D. Conn. 1986) (state enforcement action).

recently in *International Paper Co.* v. *Ouellette*, 107 S. Ct. 805, 812, 813 (1987), the Clean Water Act is a "carefully drawn statute," with "the balance of public and private interests so carefully addressed by the Act." Rewriting the statute to confer jurisdiction over citizen penalty actions against those alleged "to be *or to have been* in violation" would disrupt the balance struck by Congress in this "carefully drawn statute."

In *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), this Court emphasized the importance of adhering to the plain language of the very citizen suit provision at issue here. In that case, the Court rejected arguments that the language of a savings clause in the citizen suit provision should be read expansively to implement the purported intent of Congress. The Court emphasized that "[w]e * * * are inclined to view the [savings clause] as meaning what it says" and that "[w]e prefer to read the statute as written." *Id.* at 328, 329 n.22.

Although this Court has not directly considered the question presented in this case, it has consistently regarded the citizen suit provision as addressed to ongoing violations rather than those that have ceased prior to suit. In *Middlesex County*, 453 U.S. at 6, the Court recognized that the citizen suit provision "allows suits under the Act by private citizens, but authorizes only prospective relief * * *." Civil penalties for violations that have abated before suit is filed obviously do not constitute "prospective relief." Accordingly, suits claiming civil penalties for totally abated violations cannot form the basis of an action under the citizen suit provision.[14]

In *International Paper*, *supra*, the Court outlined the remedies provided under the Clean Water Act, including

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[14] *See also City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d at 1014 (citizen suit "provision authorizes a civil action against a party 'alleged to be in violation' of effluent standards or limitations * * *. It does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past").

" 'citizen suits' that allow individuals * * * to compel the EPA to enforce a permit." 107 S. Ct. at 812. Referring to the availability of relief to the private citizen respondents in *International Paper*, the Court noted that "[i]f, as was also alleged in respondents' complaint, IPC *is violating* the terms of its permit, respondents may bring a citizen suit *to compel compliance*. 33 U.S.C. § 1365." 107 S. Ct. at 815 n.18 (emphasis supplied). Here, of course, Gwaltney had ceased "violating the terms of its permit" prior to suit—following installation of a new and expensive treatment system—and accordingly a citizen suit could not be brought "to compel compliance." Compliance had already been achieved.

The court below rejected adherence to the plain meaning of the statutory language because it found that language ambiguous. App. 8a. This view was not shared by the two other Courts of Appeal that have addressed the present question. The Fifth Circuit in *Hamker* rejected the contention "that 'to be in violation of' means 'to have violated' " because it "obviously strains the grammar of the statute and diverges from its ordinary meaning." 756 F.2d at 395. The court concluded that the "ordinary meaning" of the statutory language "requires an allegation of an ongoing violation." *Id.* The First Circuit in *Pawtuxet Cove* stated that "[w]ith great respect to the Fourth Circuit, we find its conclusion of ambiguity unpersuasive * * *." 807 F.2d at 1092. While the First and Fifth Circuits disagreed slightly over precisely how to define "in violation," both agreed that the statutory language was "addressed to the present." *Pawtuxet Cove*, 807 F.2d at 1091.[15] Whatever disagreement may exist

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[15] The Fifth Circuit in *Hamker* held that there was no jurisdiction over a citizen suit seeking penalties for an oil pipeline leak when the pipeline had been repaired and the leakage problem fully abated prior to suit. 756 F.2d at 394-395. The First Circuit in *Pawtuxet Cove* affirmed the dismissal of a citizen suit for lack of jurisdiction when the citizen suit sought penalties for past violations, and "there was no reasonable likelihood that [the] alleged infractions would continue." 807 F.2d at 1094. The First Circuit's test for jurisdiction focused on whether "it is reasonable to believe

over precisely what constitutes an ongoing violation sufficient to satisfy the jurisdictional requirement that the defendant "be in violation," such disagreement does not grant license to ignore the requirement altogether and embrace an "unlimited meaning" of the statute, conferring jurisdiction over purely past violations. *Id.* at 1092.[16]

Respondents argued below that reliance on the plain meaning of the statute would lead to absurd results, allowing persistent violators of the Act to escape liability unless they happened to be "surprised in the physical act of violating the Clean Water Act at the moment the complaint is filed."[17] This argument attacks a straw man. The jurisdictional prerequisite that the permit holder "be in violation" requires that there be an ongoing violation before a citizen suit may be commenced; it does not require an exceedence of a permit limit on the precise day suit is filed. The chronic episodic violator who fortuitously avoids a permit exceedence on the

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that misconduct will continue" when suit is filed. *Id.* Both formulations—contrary to the holding below—give substance to the "in violation" requirement in the statute. Jurisdiction is lacking in this case under either the Fifth or First Circuit approach, since not only did Gwaltney's violations cease before suit but Gwaltney completely cured the problems that had resulted in the past violations well before suit.

[16] The court below suggested that the phrase "in violation" could cover purely past violations, in the same sense that a taxpayer who underpaid one year, but not the next, continues to be "in violation" of the tax laws. App. 9a n.10. The First Circuit, however, correctly found

> the argument forced, and the analogy inapt. In the case of the taxpayer, the violation was the non-payment, and it, of course, continued until the obligation was met. A ceased improper discharge does not "continue." Moreover, the "violation" defined by the statute is not the non-payment of the penalty.
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> Nor does the statute speak in terms of "taint." This might be arguable if it had read "is a violator," but "is * * * in violation" speaks in terms of activity. [*Pawtuxet Cove*, 807 F.2d at 1092.]

[17] Br. of Plaintiffs-Appellees below at 20.

day of suit can properly be brought within the statute without treating "to be in violation" as if it read "to be, or to have been, in violation."

While some courts confronted with the problem of the chronic episodic violator have abandoned the plain language of the statute altogether, others have recognized that the language can include the chronic episodic violator without conferring jurisdiction over those whose violations have completely abated. Thus, the First Circuit has observed that "the words 'is * * * in violation' should be sufficiently liberally construed to comport with the injunctive purpose of the Act—conduct indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one." *Pawtuxet Cove*, 807 F.2d at 1093. Similarly, Judge Williams has pointed out that "the requirement that the polluter be 'in violation' clearly is broad enough to cover the chronic episodic violator." *Hamker*, 756 F.2d at 399 (Williams, J., concurring). In *Sierra Club* v. *Kerr-McGee Corp.*, 23 Env't Rep. Cas. (BNA) 1685 (W.D. La. 1985), a court applying the *Hamker* rule declined to dismiss a suit in which a series of exceedences—attributable to the same cause—occurred intermittently on various days up to the time of suit, even though there was no exceedence on the day suit was actually filed. The court held that the facts could support the existence of an "ongoing violation" such that the defendant could be held "to be in violation" under the Act. *Id.* at 1690; 33 U.S.C. § 1365(a). Such a holding does not depart from the plain language of the statute—which requires that the defendant "be in violation"—but simply recognizes that a permit holder is "in violation" when discharges exceeding permitted levels continue unabated up to the time of suit, even if they do not occur on a daily basis.

There is a profound difference between the permit holder who has violated the permit in the past but corrected the situation so that the violations have completely

abated, and the permit holder who has repeatedly violated in the past and continues to operate the system in the same manner, taking no action to abate the continuing violation. There is a *reason* the former did not exceed any permit limits on the day in question: he is not "in violation;" the violation has abated. There is no reason the latter did not exceed any limits, other than happenstance: his violation is ongoing, and accordingly he may be considered "to be in violation" under the terms of the statute.

In light of the foregoing, there is no merit to respondents' contention that reading the statute as written would impose serious practical burdens on citizen plaintiffs. For example, respondents have argued that DMRs often do not require daily sampling, so that it may be difficult to determine if the defendant exceeded the permit on the day suit was filed. Such a determination is not required.[18]

According to respondents, the lag time in the filing of DMRs means that citizen plaintiffs can never be certain if a violation is occuring when they file suit. Therefore, respondents reason, jurisdiction should be found even if the defendant is not in fact "in violation" when suit is filed, to avoid thwarting the plaintiffs' "expensive and time-consuming preparation for litigation." Br. in Opp. at 26-27. This purported problem only arose in this case, however, because Gwaltney achieved full compliance with the Act before suit was filed. It seems a curious argument that the parties and the courts should be put through

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[18] If the frequency of sampling ever becomes a practical problem, the enforcement authorities are free to require more frequent or even daily samplings in the permits they issue. The Clean Water Act authorizes the Administrator to require permit holders to establish and maintain such records of effluent discharges and to make such reports as the Administrator may "reasonably require." 33 U.S.C. § 1318(a)(3)(A). *See* S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), *reprinted in* 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972* ("Leg. Hist.") 1499 (1973).

the expense and time of a full trial—after the objectives of the Clean Water Act have already been achieved—simply to avoid "thwarting" the expense and time allegedly incurred in *preparation* for trial.

Moreover, respondents plainly exaggerate the expense and time involved. The record in this case demonstrates that Gwaltney's DMRs were typically completed about one week after the end of the covered month.[19] Plaintiffs in citizen suits can thus promptly learn whether an ongoing violation exists, without any waste of litigation resources. And the expense and time involved in filing a complaint in these cases are virtually nonexistent, since the DMRs furnished by the defendants themselves generally suffice to establish a violation of the Act. *See* JA 58. The remarkable ease of filing such suits makes the brief wait for a current DMR a truly insignificant burden, particularly since jurisdiction will only be lacking when—as here—the defendant has already achieved full compliance with the Act.

In this case, there was neither a violation when suit was filed nor an unabated ongoing violation leading up to suit. Gwaltney was in complete compliance with the Act a full month before suit was filed. This was not fortuitous, but a direct result of actions Gwaltney took long before suit to correct the problems with its treatment systems that had led to violations in the past. Indeed, chlorination problems were resolved twenty months prior to suit. TKN violations ceased when the system Gwaltney completed eight months prior to suit achieved designed efficiency levels. It was evident well before suit that Gwaltney's new system—approved by the Board—would achieve compliance with the Act, as in fact it did.

The permit exceedences that occurred in the winter and spring of 1983-1984 cannot support any allegation that Gwaltney was a chronic episodic violator. The Dis-

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[19] *See, e.g.*, JA 11 (DMR for May 1984 completed June 8, 1984); JA 12 (DMR for March 1984 completed April 6, 1984).

trict Court itself recognized that those exceedences were the necessary result of the start-up of Gwaltney's new system. *See* JA 110, 115. As the court concluded:

> According to the evidence, Gwaltney's violations after starting up its new system were largely uncontrollable; there is no way to start up a biological treatment system without violations. A biological treatment system is apparently the best sort of system, overall, for a plant such as Gwaltney's. There is no evidence that Gwaltney's start-up period was greater than one would expect. [JA 115.]

Basing jurisdiction in this case on Gwaltney's unavoidable start-up violations—which, in any event, completely ceased one month prior to suit—would perversely penalize Gwaltney for installing a new, fully effective system to correct the problems it inherited. The present case is thus hardly one in which a chronic violator happened to avoid exceeding its permit upon the filing of a citizen suit, but rather one in which a citizen plaintiff exhumed purely past violations by a permit holder that had achieved full compliance with the Act.[20]

In addition to the chronic episodic violator, respondents have also raised the spectre of the violator who deliberately "turns off the spigot" immediately prior to suit. A permit holder, however, has no way of knowing when a citizen plaintiff will file suit once the notice period has elapsed, and accordingly cannot cease dis-

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[20] There would be no jurisdiction in this case under the test articulated by the First Circuit in *Pawtuxet Cove*. Gwaltney's conduct was clearly not "indicative of continuing or renewed violations," but rather indicated that the past violations were "matters over and apparently done with." 807 F.2d at 1093. Given the improvements made by Gwaltney—with full notice to and approval by the Board—it was clearly not "reasonable to believe that misconduct will continue." *Id.* at 1094. In fact, the District Court did not issue an injunction banning future permit violations, even though one was requested in respondents' complaint. App. 83a. *See Pawtuxet Cove*, 807 F.2d at 1094 (test for jurisdiction over penalty action "is precisely the showing that would induce a court to issue an injunction").

charges immediately prior to suit. To take this case as an example, respondents' notice letter was dated February 29, 1984. *See* App. 80a. Respondents could have sued at any time after April 29, 1984, but did not do so until June 15. In some cases citizen plaintiffs wait many months after they satisfy the sixty-day notice requirement to file suit. *See, e.g., Student Public Interest Research Group* v. *Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1427 (D. N.J. 1985) (one-year delay). The violator "turning off the spigot" to avoid suit not only would have to do so promptly but would also have to *keep* the spigot turned off. The end result is hardly a circumvention of the Act, but precisely what the Act was intended to achieve—an end to discharges in violation of the permit.

In any event, Gwaltney's actions in this case were hardly an effort to "turn off the spigot" to avoid a citizen suit, and neither the District Court nor the Court of Appeals suggested that they were. Far from "turning off the spigot," Gwaltney continues to discharge appropriately treated effluent into the Pagan River, pursuant to its permit. Gwaltney attained compliance with TKN limits not by temporarily suspending discharges but by installing a new, state-of-the-art wastewater treatment system. Gwaltney began planning that system two years before respondents filed suit, and completed construction of the system eight months prior to suit. *See* JA 18, 43-44, 48-50. The separate chlorination problem was fully resolved twenty months prior to suit. *See* App. 87a; JA 100. Any suggestion that Gwaltney undertook these substantial capital improvements as a means of "turning off the spigot" to avoid a citizen suit that would not be filed for many months ascribes to Gwaltney a degree of clairvoyance for which there is no support in the record.

II. The Purpose and Legislative History of the Citizen Suit Provision Reinforce the Statutory Limitation to Ongoing Violations

An understanding of the role of the citizen suit in the statutory scheme, and of the genesis of the statutory lan-

guage, reinforces the plain meaning of the words chosen by Congress. The court below considered itself justified in adopting "an expansive reading" of the citizen suit provision because "[a]ny other reading of the Act would eliminate a significant deterrent to violations of the Act and severely undercut the Act's ambitious purpose, 'to restore and maintain the chemical, physical and biological integrity of the nation's waters.'" App. 12a, 10a (quoting 33 U.S.C. § 1251(a)). As this Court noted in considering a similar question in *International Paper*, however, "it is not enough to say that the ultimate goal * * * is to eliminate water pollution." 107 S. Ct. at 813. Such an approach would authorize courts to override "the balance of public and private interests so carefully addressed by the Act" in imposing their own views about how to promote the objective of Congress. *Id.*[21]

The inquiry into legislative purpose must focus more narrowly on the role Congress intended citizen suits to play in the regulatory scheme. As the Fifth Circuit noted in *Hamker*, "[p]rimary enforcement responsibility under

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[21] As the Court noted in *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 106 S. Ct. at 689:

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents effectuation of congressional intent.

See also United States v. *James*, 106 S. Ct. at 3121 ("'we assume that the legislative purpose is expressed by the ordinary meaning of the words used'") (quoting *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982)); *California* v. *Sierra Club*, 451 U.S. 287, 297 (1981) ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide").

the Act lies with the states and the Administrator." 756 F.2d at 395. Under the Act, States "desiring to administer their own permit programs must demonstrate that state officials possess adequate authority to abate violations through civil or criminal penalties or other means of enforcement." *Middlesex County*, 453 U.S. at 13. The Commonwealth of Virginia met these standards in its State Water Control Law, which authorizes the Board to require regulated companies like Gwaltney to furnish information and submit to investigation. The Board may issue administrative orders and rules, obtain injunctions and other orders in court, and impose civil penalties for purely past violations. Va. Code § 62.1-44. As noted, Gwaltney kept the Board fully informed of its plans, participated in all public meetings on the status of its work, and received Board approval of its actions.

The Clean Water Act also grants a broad array of enforcement powers to the Federal Government. The Administrator of EPA is authorized to issue compliance orders to any person found to be in violation of statutory or permit conditions, including conditions for which no citizen suits are authorized. 33 U.S.C. § 1319(a). The Administrator may also respond to violations by bringing suit, and a court in such a case may impose civil penalties. *Id.* § 1319(b), (d). The Act also authorizes criminal prosecution in suitable cases. *Id.* § 1319(c). *See Middlesex County*, 453 U.S. at 13.

Congress "supplemented" this broad array of enforcement authority granted to the States and the Federal Government by also authorizing citizen suits of a "limited nature." *Id.* at 14, 17 n.27. The court below, however, did not regard the citizen suit provision as a limited supplement to the enforcement powers vested in the States and EPA, but rather held that a private citizen's power to seek penalties for purely past violations must "be viewed as co-extensive with the enforcement powers of the EPA." App. 10a. Even assuming *arguendo* that

EPA can seek penalties for purely past violations,[22] there simply is no basis for supposing that private citizens must have the identical authority. *See Hamker*, 756 F.2d at 395 (citizen suit "section obviously does not permit the citizen to *duplicate* the Administrator's powers * * *. [T]he Administrator may have the power to seek some redress for past violations, but this is no reason to waive the statutory requirement that *citizens* must allege that the defendant is 'in violation' of an effluent standard, limitation or order") (emphasis in original).

Not only are the roles of the government enforcement authorities and private citizens distinct under the Act, but the language of the provision authorizing suit by the Administrator is significantly different from the language of the citizen suit provision. The provision authorizing suit by the Administrator, 33 U.S.C. § 1319(b), does *not* limit jurisdiction to actions against those "alleged to be in violation of" the Act. On the contrary, it authorizes the Administrator to bring suit for any violation for which he is authorized to issue a compliance order. *Id.* The Administrator may issue a compliance order when he "*finds* that any person is in violation" of the Act. 33 U.S.C. § 1319(a) (emphasis supplied). Such findings at a point prior to suit—or the authority to make such findings, even if not exercised—may support jurisdiction in a penalty suit by the Administrator for a violation that ceases before suit. The citizen suit section contains no similar provisions.[23]

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[22] That question is not presented here and need not be decided. The Commonwealth of Virginia, which has primary enforcement responsibility in this case, clearly does have the power to seek penalties for purely past violations. Va. Code § 62.1-44.15(8c) (Supp. 1986) ("the Board may proceed directly under [its civil penalty powers] for any past violation").

[23] It is significant that the United States agrees that "the jurisdictional provisions pertaining to citizen suits need not, and indeed should not, be construed in tandem with the governmental enforcement provisions." Brief for the United States as Amicus Curiae Supporting Appellants at 20, *Sierra Club* v. *Shell Oil Co.*, Nos. 85-3753, 85-3762, 85-3763 (5th Cir.) (app. pending).

The purpose of citizen suits is to help secure abatement of ongoing violations of the Act. Under the terms of the Act, prospective citizen plaintiffs must give notice to the Administrator, the State, and the alleged violator sixty days before filing suit. 33 U.S.C. § 1365(b). If the Administrator or the State responds by bringing suit "to require compliance with the standard, limitation, or order," the citizen may not commence his action. *Id.* This provision clearly links the citizen suit to an effort "to require compliance," indicating that when compliance has already been achieved—when the discharger is not "in violation"—a citizen suit would not be appropriate in the first place. If citizens could sue for purely past violations, the government could hardly supplant the citizen suit by bringing an action "to require compliance."

In addition to notifying the Administrator and the State, a would-be citizen plaintiff is required by the statute to give sixty-day notice to the alleged violator as well. 33 U.S.C. § 1365(b)(1)(A)(iii). The purpose of notifying the alleged violator is to afford him an opportunity to bring himself into compliance, and thereby avoid the necessity for a citizen suit altogether. As explained by the court in *Hamker*, "it is most reasonable to read the requirement that notice also be given to the alleged violator as an indication that where the violator responds to the notice by bringing himself into compliance, the citizen loses the right to bring suit under 1365(a), just as he loses the right to commence an action where the Administrator or the state responds by diligently prosecuting an action against the alleged violator * * *." 756 F.2d at 396. *See Proffitt* v. *Commissioners, Township of Bristol*, 754 F.2d 504, 506 (3d Cir. 1985) ("The purpose of the sixty-day notice requirement is to obviate the need for resort to the courts by prompting *either* administrative enforcement of the laws *or* voluntary compliance by alleged violators") (emphasis supplied). Thus, the requirement of notice to the violator was intended to pro-

mote abatement, and if the violation is abated prior to suit—as here—the citizen suit may not be commenced.[24]

The legislative history of the citizen suit provision reinforces the conclusion that Congress authorized citizen suits to be brought only to abate ongoing violations of the Act.[25] The Senate Report, for example, repeatedly refers to citizen suits in the context of abating violations. *See* S. Rep. No. 414, *supra*, 2 Leg. Hist. at 1499 ("citizen suits seeking abatement"), 1498 (citizens may file actions when government authorities do not take action to abate violations), 1499 (attorneys fees awardable to citizen plaintiffs "in actions which result in successful abatement").[26] The hearing record also repeatedly reflects the understanding that citizen suits were authorized only when necessary to abate an ongoing violation that either the State or EPA has not taken action to abate.[27]

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[24] *See also Garcia* v. *Cecos International, Inc.*, 761 F.2d at 82; *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 511 F.2d 809, 814 (D.C. Cir. 1975).

[25] Since both the plain language of the citizen suit provision and the structure of the statute demonstrate that citizen penalty actions are limited to ongoing violations, resort to legislative materials in search of rather than to resolve ambiguity is unnecessary. *See Rubin* v. *United States*, 449 U.S. 424, 430 (1981); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. at 108. Application of this general rule is particularly apt here because Congress "tried in this legislation not to leave the final evaluation of the bill to legislative history, but instead to write into law as clearly as possible the intent of the Congress." 118 Cong. Rec. 33693 (1972) (Sen. Muskie), 1 Leg. Hist. at 164. In any event, the pertinent legislative history simply confirms the interpretation mandated by the statutory language, structure, and purpose.

[26] *See also* 118 Cong. Rec. 10203 (1972), 1 Leg. Hist. at 347 ("This legislation allows citizens to bring civil suits against polluters alleged *to be violating* required standards") (Rep. Madden) (emphasis supplied); *Pawtuxet Cove*, 807 F.2d at 1093 n.2.

[27] *See, e.g., Water Pollution Control Legislation, Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 1st Sess. (1971) at 114 ("Any person

As the Court recognized in *Middlesex County*, the citizen suit provision in the Clean Water Act "was expressly modeled on the parallel provision of the Clean Air Act," and "the legislative history of the latter Act contains explicit indications that private enforcement suits were intended to be limited to the injunctive relief expressly provided for." 453 U.S. at 18 n.27. The purpose of the citizen suit provision in the Clean Water Act did not suddenly change with the addition of civil penalties, which were not available under the Clean Air Act. The fact that penalties may be awarded under the Clean Water Act in a suit properly brought to abate an ongoing violation, while they may not be awarded under the Clean Air Act, does nothing to diminish the force of the parallel drawn by this Court in *Middlesex County*.

The legislative history of the Clean Water Act supports this view. Both the Senate and House reports, which emphasized that the citizen suit provision was modeled after that of the Clean Air Act, noted the addition of civil penalties almost in passing. There was no suggestion that this modification altered the abatement purpose or nature of the citizen suit.[28] As Judge Aldrich concluded for the First Circuit in *Pawtuxet Cove*:

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may sue a polluter to abate a violation") (staff analysis), 707 (citizen suits "are brought for the purpose of abating pollution") (Sen. Eagleton); *Water Pollution Control Legislation-1971 (H.R. 11896, H.R. 11895), Hearings Before the House Comm. on Public Works*, 92d Cong., 1st Sess. (1971) at 369 ("retain for [citizens] the ultimate power to move against that willful polluter") (testimony of Stephen Saltzman, Washington Representative, Trout Unlimited), 439 ("citizen's suit provision permits the citizen to * * * provide with his own resources what is in essence a public benefit, namely, stopping pollution") (testimony of David R. Zwick, Project Director, Nader Pollution Control Study Project).

[28] *See* S. Rep. No. 414, *supra* at 79, 2 Leg. Hist. at 1497:

> The Committee has established a provision in the bill that would provide citizen participation * * * modeled on the provision enacted in the Clean Air Amendments of 1970. As in that Act the provision in this bill is carefully restricted to actions where violations of standards and regulations or a failure on

> The Clean Air Act, from which the Clean Water Act took the phrase "is * * * in violation," * * * provided for injunctive relief only. Alertness of concerned citizens * * * was of moment, but of secondary importance; even when, in enacting the Clean Water Act, Congress added penalties, such were to go to the government. *There was no change in purpose.* Rather, House and Senate Reports on the Clean Water Act characterize the addition of civil penalties as simply a modification of the citizen's action for injunction authorized under the Clean Air Act. [807 F.2d at 1092-93 (emphasis supplied).]

In the face of this legislative history, and the plain language of the statute, respondents rely on a stray comment by one legislator in a written statement inserted into the Congressional Record. Although Senator Muskie's written insert did indicate that a citizen may bring an action against a person "who is alleged to be, or to have been, in violation," 118 Cong. Rec. 33700 (1972), 1 Leg. Hist. at 179, "[t]he short answer is that Congress did not write the statute that way." *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979). On the contrary, the statutory language actually adopted by Congress limited citizen suits to those against a person "who is alleged to be in violation of" the Act. 33 U.S.C. § 1365(a).[29]

> the part of officials to act are alleged. One modification would allow the Courts to impose civil penalties provided as a result of actions brought by citizens.

See also H.R. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972), 1 Leg. Hist. at 820 ("Section 505 closely follows the concepts utilized in * * * the Clean Air Act. However, this legislation authorizes the courts to impose civil penalties, as well as injunctive relief").

[29] It is important to recognize that Senator Muskie's comment is not an interpretation of the statutory language, nor a gloss on it. It is rather an addition to the exact language enacted by Congress. Congress did not, however, enact the addition. Relying on the written insert "would be * * * permitting one member to override the intent of Congress as expressed in the language of the statute." *Monterey Coal Co.* v. *Federal Mine Safety and Health Review Comm'n*, 743 F.2d 589, 598 (7th Cir. 1984).

Reliance upon Senator Muskie's written insert would be peculiarly inappropriate in this instance. The Senate passed the conference bill within minutes of Senator Muskie's oral remarks, and thus did not have any opportunity to consider the written insert. 118 Cong. Rec. 33718 (1972). *The oral remarks did not contain the "or to have been" language.*[30] The stray comment in the written insert is the only item in the voluminous legislative history that departs from the abatement purpose expressed throughout the legislative materials.[31] It provides an excellent example of why, as this Court has repeatedly emphasized, courts should not rely on such remarks, particularly "one isolated remark by a single Senator," in seeking to discern legislative intent. *Weinberger* v. *Rossi*, 456 U.S. 25, 35 (1982). This is particularly true when the stray remark is directly contrary to the plain language of the statute and every other indication of intent in the legislative history.[32]

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[30] In his oral remarks, Senator Muskie simply noted that "[c]itizen suits can be brought to enforce against both continuous and intermittent violations." 118 Cong. Rec. 33693 (1972), 1 Leg. Hist. at 163. As noted, Gwaltney agrees that a permit holder may be considered "to be in violation" on the basis of ongoing intermittent violations as well as continuous violations. *See supra* at 16-18. Nothing in Senator Muskie's spoken words suggests a departure from the statutory language requiring an ongoing violation.

[31] The Conference Report—which the Senate was considering when Senator Muskie made his remarks—simply reiterates the statutory language, noting that citizen suits may be brought against those "alleged to be in violation of an effluent limitation." S. Rep. No. 1236, 92d Cong., 2d Sess. 145 (1972), 1 Leg. Hist. at 328. It does not contain the "or to have been" language of Muskie's written insert, or any similar language suggesting jurisdiction over past violations. There was no indication whatsoever during House consideration of the Conference Report that citizen suits could be brought for purely past violations. *See* 118 Cong. Rec. 33747-67 (1972), 1 Leg. Hist. at 225-279.

[32] The court below considered itself justified in ascribing talismanic significance to the comments of a single legislator because the legislator was Senator Muskie, a sponsor of the Clean Water Act. App. at 14a n.13. As this Court has often noted, however,

Permitting citizen suits seeking penalties for purely past violations would also contravene the clear congressional intent to limit the impact of citizen suits on the federal courts. In *Middlesex County*, this Court recognized that the citizen suit provision in the Clean Air Act—the model for the provision at issue in this case—was defended against the charge that it "'may burden the courts unduly'" on the ground that it offered "'no hope of financial gain and the very real prospect of financial loss'" for the citizen plaintiff. 453 U.S. at 18 n.27 (quoting 116 Cong. Rec. 33104 (1970) (Sen. Hart)).[33] Expanding the scope of the citizen suit provision to include suits for purely past violations would, contrary to the intent of Congress, provide a concrete financial incentive for citizen suits in federal court.

Penalties under the Act are payable to the United States Treasury, not to citizen plaintiffs. *See* S. Rep. No. 414, *supra* at 79, 2 Leg. Hist. at 1497 ("any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant"); H.R. Rep. No.

"[t]he contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history." *Weinberger* v. *Rossi*, 456 U.S. at 35 n.15. *See Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. at 118; *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979). The First Circuit declined to sanction citizen penalty actions for purely past violations on the strength of Senator Muskie's remarks, noting that "[w]ith due respect to Senator Muskie, we do not think an ambiguity is to be created out of whole cloth by his individual remarks." *Pawtuxet Cove*, 807 F.2d at 1093 n.3. Indeed, as two commenators have noted, Senator Muskie's "enthusiasm may explain his expansion of the statutory language." Schwartz & Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 Natural Resources Lawyer 327, 348 (1984). Sanctioning such an expansion on the basis of an isolated comment in a written insert in the Congressional Record "would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." *Regan* v. *Wald*, 468 U.S. 222, 237 (1984).

[33] *See also City of Highland Park* v. *Train*, 519 F.2d 681, 690-691 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976).

911, *supra* at 133, 1 Leg. Hist. at 820 ("penalties imposed would be deposited as miscellaneous receipts in the treasury and not be recovered by the citizen bringing the suit"). However, as demonstrated in several *amicus curiae* briefs, the prospect of large penalties is all too often used as leverage to obtain settlements benefiting the citizen plaintiffs. Indeed, it is *only* through settlement that the citizen plaintiff obtains funds (other than attorneys fees) or control over funds, since any judgment goes to the Government.[34] It is common knowledge in the industry that citizen suits are often settled by contributions to the plaintiff groups bringing suit or to projects sponsored by those or other groups.[35]

Such settlements circumvent the clear intent of Congress that penalties under the Act go to the Treasury. The problem is illustrated by a settlement involving the two respondents in this case. Respondents recently settled a citizen penalty action against Bethlehem Steel Corporation, pursuant to which Bethlehem agreed to pay $1.5 million—not to the Treasury, but to "a third party environmental fund manager * * * designated by NRDC and CBF * * *."[36] The funds are to be used to help

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[34] Defendants have an incentive to settle in light of the size of the penalties that might be imposed and because there typically are no issues of liability to litigate—the DMRs generally establish liability.

[35] *See* Boyer & Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 Buffalo L. Rev. 833, 840, 932-933 (1985); Miller, *Private Enforcement of Federal Pollution Control Laws: Part III*, 14 Env't L. Rep. (ELI) 10407, 10426 (1984); Environmental Law Institute, *An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes* V-16 (Sept. 1984); Schwartz & Hackett, 17 Natural Resources Lawyer at 359. The United States recognized that this is a serious problem in the *amicus* brief it filed below. *See* Br. at 26 n.18 ("parties to a private enforcement action could attempt to circumvent the court's penalty assessment and unjustly enrich the plaintiffs at the expense of the Treasury").

[36] *Chesapeake Bay Foundation and Natural Resources Defense Council, Inc.* v. *Bethlehem Steel Corp.*, Civ. No. Y-84-1620 (D. Md.),

restore and protect the Chesapeake Bay. While Gwaltney applauds this objective, Bethlehem's payment should have gone to the Treasury, not to a private fund managed by a designee of the citizen plaintiffs. And the decision on how to spend funds meant for the Treasury should have been made by Congress through the appropriations process and not by private parties. Congress could well have decided that the funds be used not for the Bay but for Lake Michigan, or the Mississippi River, or not for environmental projects at all.[37] The settlement process encouraged by permitting citizen plaintiffs to sue for purely past violations establishes such plaintiffs not only as "private attorneys general" but as private chairpersons of appropriations committees as well.[38] Such a result undermines this Court's conclusion in *Middlesex County* that the Act did not create a private right of action, and erects the citizen suit as a potent fundraising device for private organizations—a far cry from Senator Bayh's description of "[t]hese sorts of citizen suits—in which a citizen can obtain an injunction but cannot obtain money damages for himself." 118 Cong. Rec. 33717 (1972), 1 Leg. Hist. at 221.

Consent Decree ¶ 6 (Feb. 12, 1987). Bethlehem also consented to pay $500,000 directly to the NRDC and CBF in "settlement" of their "costs and fees." *Id.* ¶ 7.

[37] *See* Boyer & Meidinger, 34 Buffalo L. Rev. at 932-933 ("For the plaintiff groups, the prospect of investing the money in environmental restoration or improvement is usually preferable to having it disappear into the federal treasury, where it would almost surely be diverted to different uses").

[38] Requiring settlements to be reviewed by enforcement authorities does not cure these problems. Such a requirement would do nothing about the problem of settlements after notice but prior to the institution of suit. In addition, the fact that EPA or state enforcement authorities concur in a private party's conclusion about how to spend funds meant for the Treasury is hardly justification for circumventing the statutory requirement. EPA itself could not settle cases by having funds paid into EPA's budget for use in promoting environmental projects.

The prospect of securing settlements based on purely past violations may account for an already significant and burgeoning burden on the federal courts. The Senate Committee on Environment and Public Works noted recently that "[i]n the past two years, the number of citizen suits to enforce NPDES permits has surged so that such suits now constitute a substantial portion of all enforcement actions filed in Federal court under this Act." S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985). Since 1983 alone, some 600 notices of intent to sue have been filed by citizen plaintiffs.[39] As of January 1984, 65,000 permits had been issued under the Clean Water Act.[40] As noted, violations of effluent limits in those permits must be reported by the permit holders themselves in DMRs, required by law to be made available to the public and generally sufficient to establish the violations.[41] As the Act was interpreted below, "any citizen" with standing need only look up the DMRs of any one of the thousands of permit holders, find a violation—no matter how isolated, no matter how old—and file suit, seeking penalties of up to $25,000 per day for each violation.[42] Congress, of

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[39] EPA compiles and maintains a log of such notices. Until recently, this was the only notice required to be filed with the Government. The Water Quality Act of 1987 added the requirement that citizen plaintiffs serve a copy of their complaint on the Attorney General and the Administrator. Pub. L. No. 100-4, § 504, 101 Stat. 7, 75.

[40] *Hearings on Implementation of the Federal Clean Water Act Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation*, 98th Cong., 2d Sess. 4-5 (March 7, 1984) (statement of Hugh J. Wessinger, General Accounting Office).

[41] 33 U.S.C. § 1318; 40 C.F.R. § 122.41(l)(4). *See United States* v. *Ward*, 448 U.S. 242 (1980); JA 58.

[42] This result is particularly troubling in view of the holding below—which we believe to be erroneous but which is not challenged here—that a violation of a single monthly limit constitutes thirty violations instead of one, resulting in a maximum penalty of $750,000 rather than $25,000. *See* App. 18a-22a. The maximum penalty was increased by the Water Quality Act of 1987, Pub. L.

course, did not supply any statute of limitations, since it did not contemplate citizen suits for past violations, so the citizen plaintiff could reach as far back as a court permitted.[43] The citizen plaintiff would have every confidence of prevailing on liability and recovering all attorneys fees and expenses, as well as securing a settlement for its own benefit, either directly or through a third-party recipient of its choice.

The opportunity to file such a suit would exist under practically *every* permit, since the most exemplary treatment system is not expected to achieve 100 percent compliance with effluent limits. EPA's policy in establishing effluent limits ensures that isolated violations will occur under most permits:

> The Agency traditionally has recognized that it must take variability into account in establishing effluent limitations, and in recognition that *100 percent compliance is theoretically impossible*, the Agency has generally set daily effluent limitations which would be met approximately 99 percent of the time. [47 Fed. Reg. 24536 (June 4, 1982) (emphasis supplied).]

Congress expressly recognized during its most recent amendment of the Act that "EPA sets effluent limitation

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No. 100-4, § 313, 101 Stat. 7, 45, from $10,000 per day of violation to $25,000 per day for each violation. *See* note 8, *supra*.

[43] Courts that have misread the Act to permit citizen suits for purely past violations have been compelled, in the absence of a limitations provision, to struggle with the vexing issue of finding an appropriate limitations period to "borrow" for such litigation, with widely divergent results. Some courts have gone so far as to hold that there is *no* limitations period for citizen suits. *See Student Public Interest Research Group* v. *P.D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074, 1083-85 (D.N.J. 1986). Others have borrowed the five-year limitations period in Federal law for civil penalty actions, *see Sierra Club* v. *Simkins Industries, Inc.*, 617 F. Supp. 1120, 1124-25 (D. Md. 1985), while still others have borrowed limitations periods from state law. *See Sierra Club* v. *Chevron U.S.A., Inc.*, No. CV85-1851 (C.D. Cal., Jan. 14, 1986), *app. pending*, No. 86-6287 (9th Cir.).

guidelines * * * at levels which well-operated plants are statistically expected to exceed a certain small percentage of the time (usually one or five percent) over the long-term." H.R. Rep. No. 189, 99th Cong., 1st Sess. 33 (1985). *See Marathon Oil Co.* v. *Environmental Protection Agency*, 564 F.2d 1253, 1266 (9th Cir. 1977); *American Petroleum Institute* v. *Environmental Protection Agency*, 661 F.2d 340, 350 (5th Cir. 1981) ("even a facility employing the best available equipment will occasionally exceed discharge limitations").[44] Permitting citizen suits for purely past violations would thus transform what Congress intended as a "supplement" of "limited nature" to government efforts to secure abatement into a practically limitless device for private organizations to obtain funds through the federal courts, based not only on federal claims but pendent state claims as well.[45]

The holding of the court below also undermines the objectives of the Clean Water Act by permitting citizen suits to interfere with the primary enforcement responsibilities of States and the EPA under the Act. There is no doubt that Congress intended citizen suits to supplement government efforts to abate pollution, and indeed to

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[44] *See generally* Brief Amicus Curiae of the Chamber of Commerce of the United States, *et al.*

[45] The *Hamker* court noted this additional incentive to suit exacerbated by the holding below:

> If section 1365 were interpreted as permitting citizen suits for civil penalties for past violations, all state damage claims which could be brought under pendent jurisdiction could be litigated in a federal forum, thus undermining congressional intent to limit the burden on the district courts. Since the Act provides for awards of attorney's fees and expenses, there would be a substantial incentive to bring suit under the Act rather than in state court. [756 F.2d at 396.]

See Miller, *Private Enforcement of Federal Pollution Control Laws: Part II*, 14 Env't L. Rep. (ELI) 10063, 10079 (1984) (requirement that penalties be paid to Treasury rather than citizen plaintiffs "is easily circumvented in negotiated settlements * * * by trading penalties requested in federal claims for damages alleged in pendent state claims").

spur government action when necessary to stop pollution. Congress did not, however, intend to permit citizens to exhume purely past violations, and bring penalty actions on the basis of such violations. Such suits do not help abate pollution—by definition, the problem already has been abated. Instead, they actually interfere with government efforts to promote compliance with the Act.

Congress was sufficiently concerned about this problem that it required citizen plaintiffs to provide government authorities a sixty-day notice of an intent to sue, specified that government enforcement actions preclude citizen suits, and granted the Administrator authority to intervene as of right in citizen suits. 33 U.S.C. § 1365(b), (c).[46] These safeguards may be adequate to ensure consistency in government and citizen enforcement so long as citizen suits are limited to ongoing violations. But permitting citizen suits for purely past violations would clearly overwhelm the ability of EPA and the States to ensure that such suits do not interfere with effective implementation of the Act. EPA and the States would be required to devote scarce time and resources—better spent on their own enforcement efforts and regulatory activities—to review the hundreds of citizen suit notices and complaints, bring suit or intervene to preclude or ameliorate inappropriate citizen actions, and scrutinize and comment upon countless proposed consent judgments. Either government enforcement itself or consistency between government and citizen efforts would inevitably suffer, undermining the goal of the Clean Water Act.[47] That goal was "to restore

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[46] More recently, Congress added the requirements that the citizen plaintiff serve a copy of the complaint on the Attorney General and Administrator, and that the Attorney General and Administrator receive a copy of any proposed consent judgment forty-five days prior to its entry. Water Quality Act of 1987, Pub. L. No. 100-4, § 504, 101 Stat. 7, 75.

[47] In the case of purely past violations that government authorities have decided do not warrant court action, the State or EPA—to ensure consistency in enforcement—would be required to sue for the purpose of obtaining *no relief*—a peculiarly perverse waste of scarce regulatory resources.

and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), not to restore and maintain the environmental litigation bar.[48]

III. Jurisdiction Cannot Be Sustained on the Basis of Mere Allegations

Respondents argued below that jurisdiction could be sustained over their civil penalty action on the alternate ground that they made a good faith *allegation* that Gwalt-

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[48] Reading the citizen suit provision as written avoids the necessity of confronting the serious constitutional issues that would arise if respondents' contrary interpretation were accepted, as elaborated by several *amici*. *See United States* v. *Clark*, 445 U.S. 23, 27 (1980) ("It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided"). Permitting citizens to sue for penalties payable only to the Treasury for purely past violations would contravene the standing requirements of Article III. To satisfy those requirements, a plaintiff must show "an injury to himself that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *see Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Even assuming the existence of an injury to the citizen plaintiff, penalties payable only to the *Government* for purely past violations cannot redress *that injury* to the *plaintiff*. In the case of an ongoing violation, on the other hand, penalties can be imposed in connection with abatement, which redresses the actual injury to the citizen plaintiff.

In addition, authorizing private citizens to sue for purely past violations—when they are entitled to no relief themselves—contravenes the separation of powers by permitting courts and private citizens to intrude upon the Executive's responsibility to "take care that the laws be faithfully executed." U.S. Const. Art. II, § 3. *See generally* Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 897 (1983). Congress may not vest that responsibility in private citizens unaccountable to the electorate. Congress may grant such citizens the right to redress injury to themselves—as in the case of suits brought for ongoing violations—but the essentially prosecutorial function of seeking penalties payable to the Government for purely past violations must reside—if anywhere—with the accountable governmental authorities themselves.

ney was "in violation" when they filed suit. The United States as *amicus curiae* also contended that citizen suits seeking penalties could be maintained on the basis of a good faith allegation of an ongoing violation, even if the allegation turns out in fact to be untrue. The court below declined to adopt this theory and expressly did "not decide whether plaintiffs in this case made their allegations of continuing violations in good faith." App. 8a n.9.

The statutory requirement that the defendant "be in violation" of an effluent standard or limitation is a jurisdictional prerequisite to a citizen penalty action. The Government recognizes as much, since it agrees that a citizen suit may generally not be maintained seeking penalties for purely past violations.[49] Respondents and the Government argue, however, that this jurisdictional limitation written into the statute by Congress is a mere rule of pleading, easily overcome simply by alleging a continuing violation.

This Court has frequently held that jurisdictional allegations—if controverted—must be proved, and that the party seeking to invoke jurisdiction has the burden of proof.[50] As the Court noted in *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 612 n.28 (1979), "the settled rule" is that "the party claiming that a court has power to grant relief in his behalf has the burden of persuasion on the jurisdictional issue, * * * especially when he is proceeding in a court of limited jurisdiction." *See Bender* v. *Williamsport Area School Dist.*, 106 S. Ct. 1326, 1334 (1986).

The jurisdictional prerequisite of an ongoing violation is one of the "conditions which must be met by the party

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[49] *See* Brief for the United States as Amicus Curiae Supporting Appellants at 25 n.17, *Sierra Club* v. *Shell Oil Co.*, *supra* (citizen plaintiffs cannot bring "penalty-only actions against violators who have attained compliance before suit is filed").

[50] *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *KVOS, Inc.* v. *Associated Press*, 299 U.S. 269, 278 (1936); *Thomson* v. *Gaskill*, 315 U.S. 442, 446 (1942).

who seeks the exercise of jurisdiction in his favor." *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. at 189. The fact that the federal courts may exercise only that limited jurisdiction conferred by the Constitution and Congress

> precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. [*Id.*]

When jurisdictional allegations are challenged—as they were here—the District Court must determine whether the facts support the allegations necessary to sustain jurisdiction. "[W]hen a question of the District Court's jurisdiction is raised, * * * the court may inquire, by affidavits or otherwise, into the facts as they exist." *Land* v. *Dollar*, 330 U.S. 731, 735 n.4 (1947). Here, respondents stipulated that "the facts as they exist" are that Gwaltney ceased violating its permit a full month before suit was filed. Any allegation that Gwaltney was in violation at that time cannot sustain jurisdiction, since "the facts as they exist" conclusively prove otherwise.

Respondents and the Government focus on the word "alleged," but there is no evidence in the legislative history that Congress—presumptively aware of the "settled rule" that jurisdictional allegations must be proved if challenged—intended to render the "in violation" limitation meaningless by permitting it to be overcome simply by alleging that which cannot be sustained. *Any* civil action is commenced by allegations in a complaint, and the use of the word "alleged" in the citizen suit provision does not alone evince an intent to displace the usual rules governing pleading and jurisdiction.[51]

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[51] The Government's position is apparently based on a concern that intermittent violators of the Act not fortuitously escape liability in citizen suits, simply because they do not actually exceed

This is particularly true since the key language on which the Government and respondents rely was not crafted with civil penalties in mind. The language was taken *in haec verba* from the citizen suit provision of the Clean Air Act, which does not authorize civil penalties. Congress could hardly have intended the word "alleged" to create a special rule of pleading jurisdiction in citizen penalty actions, when such actions were not even before Congress at the time it devised the pertinent language. Gwaltney's interpretation of the citizen suit provision, on the other hand, is fully consistent with the genesis of the statutory language. Upholding jurisdiction to award penalties when the permit holder is "in violation" treats the penalty provision as a supplement to injunctive relief, and does not require the word "alleged" to carry a jurisdictional significance that could not have been in Congress' mind when it incorporated the language from the Clean Air Act into the Clean Water Act.

There is nothing unusual in requiring jurisdictional facts to be proved if challenged. That is the typical approach in any case in which Congress has limited the grant of jurisdiction in federal court.[52] Indeed, it is the typical approach with respect to other limitations in the citizen suit provision itself. An allegation that the citizen plaintiff has provided the statutorily required notice prior to suit is not the end of the matter if there is a challenge by the defendant. The allegation must be proved. *See*

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a permit limit on the day of suit. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Appellees below at 20. As noted, the plain language of the citizen suit provision can readily cover such intermittent violations, and accordingly there is no need to depart from the settled rules governing jurisdictional allegations to meet that case.

[52] *See, e.g., Pettis* v. *Morrison-Knudsen Co.*, 577 F.2d 668 (9th Cir. 1978); *Crowder* v. *Fieldcrest Mills, Inc.*, 569 F. Supp. 825 (M.D.N.C. 1983). The same is true with respect to constitutional limitations. An allegation of diversity of citizenship, even if made in reasonable good faith, cannot sustain jurisdiction if diversity is *in fact* lacking. *See Gilbert* v. *David*, 235 U.S. 561 (1915); *O'Toole* v. *Arlington Trust Co.*, 681 F.2d 94 (1st Cir. 1982).

Walls v. *Waste Resource Corp.*, 761 F.2d at 317. An allegation that the required sixty days have elapsed and that neither EPA nor the State has taken enforcement action will not sustain jurisdiction if it turns out that the government authorities did in fact commence such a suit, regardless of the good faith of the allegation to the contrary. By the same token, an allegation that the defendant is "in violation" cannot support jurisdiction if it turns out to be untrue.[53]

Even if the complaint alleged an ongoing violation—which it does not[54]—such an allegation cannot be considered reasonable under the circumstances. Chlorine violations ceased *twenty months* prior to suit, and—aside from

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[53] Respondents and the Government rely heavily on cases sustaining jurisdiction in diversity actions on the basis of the amount in controversy alleged by the plaintiff, even if the plaintiff ultimately recovers less than the jurisdictional amount. *See* Brief for the United States as Amicus Curiae Supporting Appellees below at 19. This approach, however, was developed to avoid the waste inherent in the dismissal of a suit after decision on the merits and judgment simply because of the amount of recovery—an issue wholly collateral to the underlying cause of action—and is not authority for permitting jurisdictional prerequisites such as the "in violation" requirement to be circumvented by mere pleading.

[54] Respondents alleged that Gwaltney had violated its permit limits in the past, as set forth in respondents' notice letter. Complaint ¶ 16, App. 82a. That letter was dated February 29, 1984, and accordingly could not constitute an allegation that Gwaltney was in violation when suit was filed over three months later. Respondents also alleged that Gwaltney violated its permit as shown in DMRs attached to the complaint and incorporated by reference. Complaint ¶ 17, App. 82a-83a. Those DMRs did not show any violation after May 15, 1984—a full month before suit was filed. Accordingly, they also could not constitute an allegation—good faith or otherwise—of an ongoing violation. Finally, respondents alleged that Gwaltney "will continue to violate" its permit. Complaint ¶ 18, App. 83a. This allegation of *future* violations falls far short of an allegation of an ongoing violation when suit was filed. *See Hamker*, 756 F.2d at 397 (allegation that condition that resulted in past discharge persists held not to constitute "an allegation that the defendant *is presently* violating an effluent standard, limitation or order") (emphasis supplied).

start-up exceedences—fecal coliform violations ceased almost *two years* prior to suit. App. 87a; JA 110, 116-117. Even the start-up exceedences for fecal coliform ceased four months before suit was filed. JA 117. There was no basis when respondents filed suit for a good faith allegation of present or ongoing violations of fecal coliform/chlorine.

Nor can the purely past TKN violations support an allegation of present or continuing violations. The TKN violations ceased before suit because of the new, state-of-the-art treatment system that Gwaltney installed. Respondents knew, of course, that Gwaltney had installed such a system. In light of the new system—approved by the Board—Gwaltney's record of *past* TKN violations was not at all indicative of present, ongoing violations. The unavoidable TKN violations caused by the start-up of Gwaltney's new system cannot form the basis of any good faith allegation of an *ongoing* violation, and even those violations ceased—as respondents stipulated—a month prior to suit.

The court below expressly did not decide whether any allegation of an ongoing violation was made in good faith. App. 8a n.9. The District Court stated that an allegation of continuing violation "appears to have been made fully in good faith," JA 83 n.8, but that tentative conclusion was limited solely to TKN violations. *See* JA 84 n.8 (discussion of good faith allegation concerned "one of the two major violation problems for which this suit was brought"). Even if jurisdiction could be sustained on the basis of mere allegations that turn out to be untrue, and even if the District Court were correct that an allegation of an ongoing *TKN* violation was reasonable, jurisdiction to impose penalties would exist only with respect to *that* ongoing violation. *See Sierra Club* v. *Kerr-McGee Corp.*, 23 Env't Rep. Cas. (BNA) at 1690.

It would be a curious result if suit could not be maintained seeking penalties for purely past violations for which no allegation of an ongoing violation could be made,

but that penalties could be imposed for those same past violations in a suit brought alleging an ongoing violation of a *separate* effluent limit. The District Court's tentative conclusion of a good faith allegation of an ongoing violation was limited to TKN, but $1 million of the $1.3 million penalty it imposed was based on fecal coliform/chlorine violations. Not only are the effluent limits for these substances separate and distinct, but the treatment systems for the two are also separate and distinct. Accordingly, an ongoing TKN violation—which did not exist and which could not reasonably be alleged to have existed—cannot form the basis for imposing penalties for purely past fecal coliform/chlorine violations.[55]

• • • •

The Court should be mindful of the very practical difficulties confronting a company such as Gwaltney, whose normal operations unavoidably generate non-toxic organic wastes. Gwaltney did not try to "make do" with the inadequate treatment system it inherited, or conceal the problems from the authorities or the public in any way. It recognized that only a new treatment system could deal with its business's effluent problems effectively and over the longterm, and accordingly it incurred the substantial capital expense of installing such a system. Gwaltney did so after consultation with and approval by the appropriate regulatory authorities, with both the authorities and the company knowing full well that start-up of the new system would inevitably result in permit exceedences. Gwaltney dutifully reported each start-up exceedence until the new system became fully effective and all violations ceased.

---

[55] In any event, the District Court's statements on the reasonableness of respondents' allegations were based on the pleading standard applied to amount in controversy questions. As noted, that standard is not applicable here. At the very least, if this Court accepts the argument that jurisdiction can be based on reasonable allegations, Gwaltney would be entitled to a remand for a factual determination of whether respondents satisfied the appropriate standard of reasonableness.

Respondents—after leafing through Gwaltney's reports, along with hundreds of others—sent the company a sixty-day notice letter and, when that period elapsed, filed suit, using Gwaltney's own DMRs as the basis for recovery. Under respondents' theory it made no difference whether Gwaltney had one violation or thousands; whether the violations occurred when suit was filed or five years before; whether the violations were deliberate, part of a pattern, and chronic, or unavoidable, isolated, and incapable of repetition; or whether the permit holder had cured the causes of the violations or ignored them altogether. If Gwaltney had settled, respondents would control the use of the settlement funds, contrary to the clear intent of Congress. If Gwaltney did not settle, it ran the risk—in light of the extraordinary method of computing penalties utilized by the District Court—of millions of dollars in penalties.

We respectfully submit that this could not have been—and was not—the way Congress intended for this statute to operate. Congress wanted violations to stop. Citizen suits were intended as a limited supplement to government efforts to secure abatement. If a company is to be assessed substantial penalties in a citizen suit regardless of whether its violations are ongoing or have completely abated, the citizen suit provision will have been turned on its head, with untoward results Congress did not intend and indeed was anxious to avoid.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the complaint dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether the federal district courts have jurisdiction to entertain a citizen suit under the Clean Water Act against a past violator without proof or an allegation that the violation is continuing at the time of filing.

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BRIEF FOR THE RESPONDENTS

STATUTE INVOLVED

Section 505(a) of the Clean Water Act, 33 U.S.C. 1365(a), provides in relevant part (emphasis supplied):

> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) *against any person* (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) *who is alleged to be in violation of* (A) *an effluent* standard or *limitation under this chapter* or (B) an order issued by the Adminis-

trator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such an act or duty, as the case may be, and *to apply any appropriate civil penalties under section 1319(d) of this title.*

STATEMENT

The basic facts and procedural history of the case are stated by petitioner and we do not repeat them here. But, unsurprisingly, the picture is painted with a lawyer's artistic license, with all the client's warts removed, the colors romanticized, and many coats of varnish added.[1] Accordingly, it may be useful to stress a few bald truths —all of them explicitly recited in unchallenged documents of record, in the parties' Stipulation (Pet. App. 85 et seq.) or in the undisturbed Findings of the district court (J.A. 56-58, 71-118).

1. For more than a year and a half before petitioner acquired it at the end of October 1981, the plant in suit had "repeatedly exceeded a number of its [permit] discharge limitations," and this was fully known to peti-

[1] To cite only two examples, Gwaltney characterizes its operations as "normal," "generat[ing] non-toxic organic wastes" (Pet. Br. 3), and describes its improvements to the plant as "a new state-of-the-art wastewater treatment system." Pet. Br. 21. In actuality, the wastes Gwaltney discharges have the potential for producing harm to aquatic organisms and can pose a public health threat (J.A. 100, 105, 106, 110, 113), and Gwaltney's wastewater treatment system improvements simply constitute standard treatment for nitrogenous wastes. J.A. 21-25.

tioner. J.A. 73, 100, 110. Indeed, from February 1980 through October 1981, the previous operator had been out of compliance for 13 months out of 21 (R. 350-A) and had committed at least 94 violations (*ibid.*), many of them by discharges grossly in excess of the permit (*see* R. 440-457). Yet, although it was aware of these defaults and of the need for substantial improvements even before purchasing the plant (*e.g.*, J.A. 65-68), petitioner was extremely slow in taking effective measures to correct either the cause of the chlorination problems or the biological treatment system. As to the first, the district court noted petitioner's refusal to seek outside advice (J.A. 100, 108), and characterized its attitude as "exceeding unconcerned," "lackadaisical," "border[ing] on benign neglect," and "reflect[ing] a certain degree of willfulness." J.A. 107-108. Likewise, as to the second problem, the court found that petitioner took no remedial steps whatever for more than six months (J.A. 110, 114) and did not complete the new treatment system until October 1983, two years after acquiring the plant. J.A. 111. Moreover, while failing to deal adequately with the waste treatment problems, petitioner increased production at the plant, putting additional burdens on the already deficient waste treatment system. J.A. 66, R. 521.

2. Predictably, the consequence of this unconcerned and unhurried approach was that excessive discharges of pollutants continued unabated for a substantial time. Indeed, significant violations persisted for more than two and a half years after petitioner became the operator, until mid-May 1984. J.A. 116-117. Nor were these merely occasional "upsets." In this period of 31 months, full compliance was achieved in only four months (J.A. 96-97, 116-117), and more than 160 different violations occurred (J.A. 100, 116-117), many quite egregious. *See* R. 314-348.

When petitioner's record is examined in greater detail, it is no better. As the district court noted (J.A. 105),

despite the attempt to "trivialize" the fecal coliform violations, these "were not *de minimis*." On at least six occasions, four to seven times the daily limits were discharged and for five months the permitted monthly average was exceeded by 58% to 150%. *Ibid.* So, also, there were 34 chlorine violations, occurring every month for a full year after petitioner took over the plant. J.A. 106, 116. And in all but two of those months, potentially very harmful excessive chlorine discharges were effected. J.A. 106.

The TKN problem persisted even longer—if, indeed, it has been permanently solved. *See* J.A. 111, 112 n.26, Pet. App. 7a n.9. There were violations as late as mid-May 1984—just a month before suit. J.A. 73, 100, 112. The permitted monthly average had been exceeded in most months up to that time, and, in addition, some 69 discharges in excess of the daily limit occurred. J.A. 116-117. Moreover, whether or not "controllable," many of the more numerous and gross violations were very fresh in June 1984. J.A. 117; R. 314-333.

Nor were these excessive discharges merely technical violations, relatively harmless to the environment. Fecally associated microbes are potential agents of disease transmission which pose a significant threat to human health. Chlorine is acutely toxic to fish and other estuarine organisms. And excessive levels of ammonia and organic nitrogen (measured by the "TKN" standard) deplete the water of dissolved oxygen and thereby endanger bottom dwelling species, such as oysters. *See* J.A. 100-113.

3. This, then, was the situation in early 1984 when respondents began the process of initiating legal action. Several violations occurred during February 1984, the month at the end of which the statutory notice of intent to sue was served. *See* Pet. App. 80a. The Complaint, filed June 15, 1984, correctly alleged that petitioner had

"continued to violate its discharge permit since that [notice letter]." Para. 17, Pet. App. 82a-83a. The most current information available to respondents at the time of filing suit (for March 1984) showed violations still to be occurring—and they did, in fact, persist some six weeks longer. It was then reasonable to suppose, as was stated in the Complaint, that "without the imposition of appropriate fines and issuance of an injunction, [petitioner would] continue to violate its NPDES permit." Para. 18, Pet. App. 83a.

We need only add that, despite an intervening judgment holding it liable, an elaborate stipulation and a trial, petitioner did not question the district court's jurisdiction on the ground that there was no ongoing violation until 11 months after the Complaint had been filed. J.A. 69; *see* J.A. 72. That, however, is now the sole issue in this Court, petitioner having long since abandoned its challenge to respondents' standing (*see* Pet. App. 2a n.1) and more recently given up its quarrels over the penalty calculation. Pet. 24 n.17; Pet. Br. 7 n.8, 33 n.42.

SUMMARY OF ARGUMENT

A

Our initial submission is that the import of using the present tense in describing the violator of the Clean Water Act against whom a citizen may file suit is not so plain as to foreclose resort to the usual aids to statutory construction. Significantly, no party and no amicus espouses a strictly literal reading of the text—which would deny jurisdiction unless the defendant were at least alleged to be actively violating his permit on the very day suit is filed. Indeed, petitioner has been ambivalent about the true reach of Section 505, apparently failing to notice the present tense as a jurisdictional restriction until almost a year after this suit was filed and now having significantly tempered its once inflexible stand.

B

The statutory context of the critical words indicates that they were not intended to preclude citizen suits in respect of past violations. First, Section 505 itself expressly authorizes the assessment of civil penalties—which obviously relate to past conduct. Moreover, a comparable use of the present tense in describing governmental suits plainly does not bar recovery against a violator who has ceased his excessive discharges, and there is no reason for reading the same phrase differently in the two provisions. Indeed, given the critical role of civil penalties in enforcing the Act, one would expect this weapon to be equally available to the citizen who is "standing in" for the government.

C

The legislative history of the Act confirms our construction. There are express statements endorsing that reading by one of the chief sponsors of the measure which cannot be explained away. And this view is endorsed in the recent Water Quality Act of 1987 which assumes that a citizen suit properly might be maintained solely to assess civil penalties in respect of past violations.

D

Implementation of the objectives of the Act is best served by the construction of Section 505 espoused by both courts below. A "private Attorney General," whose role is to step in when governmental officials default, ought to have the same right of action. The Act would too easily be frustrated if suit were barred whenever the violator, forewarned by the required notice, temporarily desisted. And delay in compliance would be rewarded—not discouraged—if past violations were automatically excused, provided they ceased before a citizen suit is filed. No. can it be right to defeat jurisdiction merely because, as here, the suit followed the notice by six weeks more than the statute requires.

E

Our construction of Section 505 does not invite a deluge of needless lawsuits. The unavailability of compensatory damages and the exposure of the plaintiff to an assessment of the defendant's costs and attorney fees both deter frivolous litigation. At all events, in recently reviewing actual experience, the Congress has declared itself well satisfied with the result.

ARGUMENT

Trimmed of frills and curlicues,[2] petitioner's argument comes down to harping on Congress' use of the present tense when referring to a potential defendant "in violation" of the Clean Water Act against whom a citizen suit may be filed. The immediate provision, it is repeatedly stressed, only permits a citizen to "commence a civil action . . . against any person . . . who is alleged *to be in violation* . . . of an effluent standard or limitation under [the] Act." Sec. 505(a)(1), 33 U.S.C. 1365(a)(1) (emphasis supplied). But the question for the Court is whether the underlined language is so unequivocal, so unambiguously clear, so obviously single-minded, that it forbids looking further to discover whether Congress really meant to bar any citizen suit filed after a violator has halted his excessive discharges, no matter how fresh the most recent violations, how long they persisted, and how likely they would be resumed once the action was dismissed. Is the text so plain that we cannot notice the statutory context and the wording of companion provisions, cannot resort to legislative history, and cannot even apply the test of common sense?

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[2] The plethora of small points and "asides" in petitioner's brief tends to deflect the reader from the central issue. In the interest of clarity, we have mostly resisted the temptation of answering petitioner by following it down every byway, and have attempted to stay on the main road. But our silence on any point ought not be read as acquiescence.

A. THE PLAIN MEANING DOCTRINE IS INAPPOSITE HERE

1. This is not that rare case—assuming the text alone should ever be the exclusive guide to meaning. *See Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 9-11, 23-24 (1976). The less crabbed reading of the citizen suit provision condoned by both courts below involves no clash with the statutory language, no contradiction, no disregard of engrossed words or smuggling in of additional ones. At worst, the construction we urge taxes Congress with a debatable lapse of syntactical precision in using one tense as shorthand for both past and present. Given the size of our statute book, there is much to be said for taking such a minor liberty in the service of economy. But, even if we are dealing with a careless accident, the reality is that common folk, including lawyers and politicians, mix and mistake their tenses much too often to give loose usage of this kind critical significance.[3] It would ill serve the framers of the law to ignore their intent because we were constrained to pretend they were always punctilious grammarians.

2. Indeed, petitioner's own ambivalence about the reach of the citizen suit provision makes our point in a most telling way. One can but wonder why it took petitioner 11 months after the filing of suit to invoke the present tense of Section 505 as a ground for challenging the court's

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[3] It is, for instance, a familiar convention to recount past events in the present tense ("I enter the intersection first; he goes right past the stop sign; he smashes into my car.") Lawyers easily lapse into the present when reciting the facts of a decided case—or the facts of the case on trial. And politicians commonly do likewise when referring to the stand of their opponent, spoken or written some days or months earlier ("He says he will reduce your taxes, while promising you more government benefits of every kind!"). Legislation is not uniquely exempt from the same habit. It is enough to note that most of the Criminal Code, although obviously addressed to past occurrences, is written in the present tense. *See* 18 U.S.C. 32-2512.

jurisdiction. (Complaint filed June 15, 1984, J.A. 1, Pet. App. 79a; Motion to Dismiss filed May 16, 1985, J.A. 5, 69). In the interim, there had been very active proceedings (*see* J.A. 1-5), including a summary judgment declaring petitioner liable (J.A. 56-58, 59-60), an amendment of that judgment (J.A. 61-62), extensive discovery, the preparation of a detailed Stipulation of facts (Pet. App. 85a-96a, R. 15-29), and a trial (R. 30-242; *see* J.A. 63-68), all accompanied by elaborate briefing. It seems fair to conclude that the meaning of the words in Section 505 was not then thought so "plain" as is now claimed.

Equally revealing, however, is petitioner's present stand. In the Court of Appeals, a more robust position was asserted. *See* Brief of Defendant-Appellant 11-14. But, in this Court, petitioner and its many friends ultimately agree that the statutory text is not to be read with absolute literalness. Although the present tense of Section 505 continues to be the mainstay of the argument on that side, no one now will be heard to espouse a construction of the citizen suit provision that requires proof, or even a bona fide allegation, that the defendant was actively violating his permit on the day the suit was filed. Pet. Br. 16-18, 29 n.30, 39-40 n.51; Br. A.C. of Chamber of Commerce of the United States, et al. 10, 18-20; Br. A.C. of Connecticut Business and Industry Association 53-59, 61; Br. A.C. of Consolidated Rail Corporation, et al. 11-13; Br. A.C. of Mid-Atlantic Legal Foundation, Inc., et al. 1, 5-6.[4] This is likewise the view of the First Circuit. *Pawtuxent Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1093-1094 (1st Cir. 1986), *petition for*

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[4] Two amici do not address the question presented at all, but, instead, advance Separation of Powers arguments against *any* reading of Section 505—contentions not before the Court. *See* Brief A.C. of Bethlehem Steel Corporation, et al. 3-4, 7 n.7; Br. A.C. of Rollins Environmental Services (N.J.) 2 and nn.2 and 3, 3-6. The full answer to these arguments was given some 45 years ago in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546-548 (1943).

cert. filed, No. 86-1562 (Mar. 17, 1987). And, if we accept Judge Williams' opinion, the same reluctance to be too literal prevails in the Fifth Circuit. *See Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 399 (5th Cir. 1985) (concurring opinion).[5] The upshot is a variegated menu revealing interesting differences among our opponents as to what being "in violation" *does* mean. *Compare, e.g.*, Br. A.C. of Chamber of Commerce of the United States, et al. 17-19 (endorsing First Circuit's focus on prospect of future violations) *with* Br. A.C. of Consolidated Rail Corporation, et al. 11 (apparently rejecting that test).

We need not detail these disagreements here. What is significant is the fact that, while invoking the "plain meaning" rule, everyone finds it necessary to escape from the strict grammar of the text and no two proponents of reversal agree on exactly what new meaning is to be given to the statutory language. Petitioner and its friends (unlike the First Circuit) also effectively delete "alleged" from Section 505. *E.g.*, Pet. Br. 37-41. We, of course, share the view that one must go beyond the immediate words to learn the intent of Congress. For our part, however, we submit that once the blinkers are removed and we are free to look to the side, and behind, the correctness of the decision below is quickly revealed.

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[5] We assume Judge Williams, as a member of the panel and a signatory of the court's opinion, is best placed to say that the court was *not* insisting on proof of an active permit violation occurring on the very day of filing. It is noteworthy, however, that some district judges within the Circuit apparently have read the *Hamker* decision more literally as requiring such proof. *See, e.g., Sierra Club v. Copolymer Rubber and Chemical Corp.*, 621 F. Supp. 1013, 1015 (M.D. La. 1985), *appeal pending*, No. 85-3763 (5th Cir.). Even in the Fifth Circuit, however, different readings of *Hamker* appear to be entertained. *See, e.g., Sierra Club v. Kerr-McGee Corp.*, 23 Env't Rep. Cases (BNA) 1685, 1688-1690 (W.D. La. 1985).

B. THE STATUTORY CONTEXT SUGGESTS OUR CONSTRUCTION OF SECTION 505

1. The first thing that strikes the eye when it is allowed to get past the words of Section 505(a)(1), quoted above, is that the citizen suit provision *itself explicitly authorizes the assessment of civil penalties in such a private action.* Sec. 505(a), 33 U.S.C. 1365(a), last clause. *See Middlesex County Sewerage Authority v. Sea Clammers Ass'n*, 453 U.S. 1, 14 n.25 (1981).[6] A layman might think this would end the debate. But lawyers do not so readily give up; the suggestion, as we understand it, is that civil penalties for past violations may be ordered in a citizen suit *only if the defendant was engaged in an "on-going violation" of the Act when the action was filed.*

One may well ask what sense that makes. It might have been plausible (albeit unrealistic) to restrict all civil enforcement of the Act to seeking prospective—injunctive—relief only. So, also, some might think it "inappropriate" for a non-governmental plaintiff to be provoking an award of penalties that are paid into the national Treasury.[7] What is *not* easy to understand is why a private complainant should be entitled to seek an order for penalties in respect of past events if violations are continuing when the suit is filed, but not otherwise.

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[6] The cited note of course qualifies the earlier statement in the Court's opinion that the citizen suit provision of the Clean Water Act "authorizes only prospective relief." 453 U.S. at 6. At all events, there was no issue in *Sea Clammers* as to what relief was available *under* Section 505. The notice requirement of that provision having been ignored, all the claims were made under other theories, on the argument that the citizen suit provision of the Act did not pre-empt or supplant all other private rights of action. *See* 453 U.S. at 5 and n.6, 9-11.

[7] This may have been the view indulged at the time of the passage of the Clean Air Act, which does not provide for the recovery of civil penalties in private litigation. 42 U.S.C. 7604. *See* p. 17, *infra*.

There is certainly no logic in such a scheme: whether to penalize or forgive the sins of the past ought not be made to depend entirely upon a present fact or a future prediction, but, rather—as in government litigation—on the gravity and persistence of the violations and any "unjust enrichment" resulting from non-compliance. Nor is that all. To restrict civil penalties to the atypical case in which the polluter's continuing violations justify an injunction is to provide the sanction when it is least needed and to withhold it when the salutary effect would be greatest. It must be deemed unlikely that Congress pointedly added the weapon of civil penalties in citizen suits, but then confined its use to situations that were adequately dealt with by issuing an injunction, whose disobedience could be punished under the contempt power.

2. We are confirmed in the view that no such unusual result was intended when we consult other provisions of the Clean Water Act, notably those dealing with *governmental* enforcement actions. Here, also, the present tense is used: the EPA Administrator may initiate civil proceedings if he "finds that any person *is in violation*" of the Act. Secs. 309(a)(1) and (3), 309(b), 33 U.S.C. 1319(a)(1) and (3), 1319(b) (emphasis supplied). But, in this context, it is all but conceded that we ought not read the provision literally as foreclosing suit because excessive discharges did not occur on the day the "finding" was recorded or the action was filed.[8] Indeed, this Court has effectively held that the government may collect civil penalties for past violations when compliance

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[8] This was made plain by the Senate Conferees in reporting the outcome of the House-Senate Conference (118 Cong. Rec. 33697 (1972) (emphasis supplied)):

> "It is expected, of course, that upon receipt of information giving reason to believe that a violation *has occurred*, [the Administrator] has an affirmative duty to take steps necessary to determine whether a violation *has occurred* . . . ."

has been achieved and injunctive relief accordingly is not sought. *Tull v. United States*, No. 85-1259, slip op. 12 (April 28, 1987). Yet, if that is so, why should comparable language be read differently in the citizen suit provision?

It is no answer to say that there are differences between governmental and private proceedings, and that the latter should not duplicate the former. To be sure, the statute draws a distinction, but it is no more than to require a waiting period for a citizen, with notice to both federal and State authorities, and to preclude a new suit if either government is already "diligently prosecuting a civil or criminal prosecution" to the same end. Sec. 505(b)(1), 33 U.S.C. 1365(b)(1). Even then, however, the citizen may intervene of right in the public action. Sec. 505(b)(1)(B), 33 U.S.C. 1365(b)(1)(B). It hardly makes sense to accord a private citizen the right to sue as intervenor but not as sole plaintiff in respect of past violations.

What is more, in respect of civil penalties, the same provision (Section 309(d), 33 U.S.C. 1319(d)) governs both public and private suits and it would be strange to give it a different scope depending on the status of the plaintiff. The fact is that, criminal sanctions aside, there is no difference in the relief available in private and governmental suits. *Compare* Secs. 505(a) and (d), 33 U.S.C. 1365(a) and (d), *with* Secs. 309(b) and (d), 33 U.S.C. 1319(b) and (d). Nor is this surprising, especially as it relates to civil penalties. Exposure to such penalties—unlike the prospect of ultimate injunctive relief—is a powerful deterrent to violations by the prospective defendant, and the actual assessment of penalties against him will deter others. Moreover, when time is of the essence—as is the case with the Clean Water Act—civil penalties are the only effective weapon for overcoming what would otherwise be the natural inclination of a discharger to postpone expenditures neces-

sary to achieving compliance and to enjoy an interim advantage over law-abiding competitors. *See* EPA Civil Penalty Policy, 41 Env. Rptr. (BNA) (Fed. Laws) 2991, 2992-2993, 2996-2999 (1984). Given this critical importance of civil penalties in the present context, one would expect the weapon to be equally available in a citizen suit—whose primary function, after all, is to substitute for a government action that should have been initiated but, for whatever reason, was not. And if (as is the fact) the government can sue for penalties only, so should the private alter ego.

3. At first blush, one might read the requirement of 60 days' prior notice to the violator in the citizen suit provision as restricting judicial intervention to those intractable cases in which the polluter refuses to comply even after warning and, accordingly, is still actively violating the Act when the action is filed. *See* Sec. 505(b)(1)(A), 33 U.S.C. 1365(b)(1)(A). The problem with that line of reasoning is that we know the Administrator may sue for penalties only, and is free to initiate court proceedings with no prior notice whatever. *See* Secs. 309(a)(1) and (3), 309(b), 33 U.S.C. 1319(a)(1) and (3), 1319(b). That being so, it would be quite extraordinary to give a violator two months to bring himself into compliance and avoid legal proceedings altogether whenever the government defaulted and a private citizen was filling the void.

On reflection, it is clear that the notice requirement in Section 505 is for the purpose of affording federal and State authorities an opportunity to act, not to offer the violator a chance of escaping the penalties of the law. He is merly an incidental beneficiary of the notice rule, presumably included only because it seemed right to inform him that he was being reported to the authorities as a lawbreaker.

C. THE LEGISLATIVE HISTORY OF THE ACT CONFIRMS OUR CONSTRUCTION OF SECTION 505

1. Given the express terms of the citizen suit provision, we make no point of the fact that the relevant committee reports refer to civil penalties as available in private actions. *See* H.R. Rep. No. 911, 92nd Cong., 2nd Sess. 133 (1972); S. Rep. No. 414, 92nd Cong., 1st Sess. 79 (1971). But it is not without significance that nothing in the reports—or elsewhere—expressly or implicitly restricts a penalty award to citizen suits filed while the violation is ongoing. The short-hand characterization of such suits as "abatement" actions (*e.g.*, S. Rep. No. 414, *supra*, at 79-81) merely reflects the reality that, most typically, a private action will be provoked by the apparently persistent violator. This is a far cry from the statement that private actions will only lie against dischargers still actively violating the Act on the day of filing. After all, a prime purpose of civil penalties is to prevent future violations by deterring those who are, for the moment, in compliance—whether the defendant himself or others.

But the matter is not left to conjecture. We have already noted the express statement of the Senate Conferees that a *government suit* may focus on past behavior. Note 8, *supra*. And we have submitted that it must equally be so in citizen suits since, examining the statutory text, it does not appear that a private action is more circumscribed as to the conduct that can be reached. Pp. 13-14, *supra*. This is confirmed when we return to the legislative history. The Senate Report (S. Rep. No. 414, *supra*, at 80) explains:

> The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same.[9]

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[9] It does not matter whether the expression "administrative enforcement" here refers to non-judicial proceedings or to court action by the EPA Administrator. Under the Act, the Administrator is

So, also, the Report impliedly repudiates the notion that the 60-day notice requirement for citizen suits was meant to offer the violator a ready escape from litigation. The stated objective is merely to "encourage and provide for agency enforcement." S. Rep. No. 414, *supra*, at 79.

2. There is, indeed, incontrovertible legislative evidence specifically espousing our construction of the citizen suit provision. As the courts below stressed, Senator Muskie, one of the principal authors and sponsors of the bill, expressly stated that view (118 Cong. Rec. 33700 (1972) (emphasis supplied)):

> This 60-day provision was not intended, however, to cut off the right of action a citizen may have with respect to violations that took place 60 days earlier but which may not have been continuous. As in the original Senate bill, a citizen has the right under Section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be, *or to have been*, in violation, whether the violation be a continuous one, or an occasional or sporadic one.

And elsewhere (118 Cong. Rec. 33693 (1972)), the same Senator said citizen suits—no less than governmental enforcement actions—would lie "against both continuous and intermittent violations."

It simply will not do to ignore these statements as "stray remarks" by "one legislator." Pet. Br. 28. The principal quotation above is derived from a written commentary, presumably a well considered and authoritative summary of the legislation in its final form by its "primary author" (*E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 129 (1977); *Train v. Colorado Public In-*

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free to file a civil lawsuit whenever he is authorized to issue a compliance order. Section 309(b), 33 U.S.C. 1319(b). *See also* Section 309(a)(1) and (3), 33 U.S.C. 1319(a)(1) and (3).

terest Research Group, 426 U.S. at 14).[10] Nor can Senator Muskie's unambiguous words be diminished by looking to the comments of another Senator speaking to *other* legislation, of two years before, that did *not* authorize penalty awards in citizen suits. Pet. Br. 30. *See* 42 U.S.C. 7604 (Clean Air Act). The Clean Water Act quite deliberately modified its model in this respect. S. Rep. No. 414, *supra*, at 79; H.R. Rep. No. 911, *supra*, at 133.

In sum, the contemporary legislative history fully confirms what the textual evidence and considerations of legislative policy already indicated: that a citizen may maintain his suit against a violator without alleging, much less proving, that excessive discharges were continuing at the time of filing.

3. What is more, Congress subsequently endorsed our reading of the citizen suit provision when it recently revisited and amended the Act. Section 314 of the Water Quality Act of 1987, Pub. L. 100-4, adds a new provision to Section 309 of the Clean Water Act permitting the *administrative* assessment of civil penalties which expressly uses the past tense: "Whenever . . . the Administrator [of EPA or the Secretary of the Army] finds that any person *has violated* . . . any permit condition or limitation." Sec. 309(g)(1)(A) and (B), as added in 1987, 33 U.S.C. 1319(g)(1)(A) and (B) (emphasis supplied). This new authority necessarily focuses on past violations, supplementing, as it does, the Administrator's pre-existing authority to issue compliance orders under Section 309(a)(1) of the Act. *See* S. Rep. No. 50, 99th Cong., 1st Sess. 26 (1985); H.R. Rep. No. 1004, 99th Cong., 2d Sess. 132-133, 135-136, 138-139

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[10] Petitioner notes that this commentary was not published in the Congressional Record until after the Senate vote. But it is entirely possible that the written summary was available to Senators before publication. At all events, we may accept the commentary as accurately reflecting the view of the Senate conferees.

(1986). Yet, the new subsection explicitly contemplates that a citizen suit may already have been filed to assess the same penalty and, in that event, allows it to proceed. Sec. 309(g)(6)(B), as added in 1987, 33 U.S.C. 1319(g)(6)(B). So, also, where the administrative penalty action is first begun, a citizen suit to the same end is precluded, but only insofar as it reaches the identical past violations. Sec. 309(g)(6)(A), as added in 1987, 33 U.S.C. 1319(g)(6)(A).[11]

There is here a strong indication that the Congress believed existing law authorized citizen suits addressing past violations that no longer required injunctive remedies. Although the new provision dealing with administrative penalties employs the past tense in describing the violation, it was evidently deemed unnecessary to amend either Section 309(a) or (b) or Section 505(a)(1) to conform. Nor can this have been mere oversight. The Water Quality Act was elaborately considered over two years before ultimate enactment, affording ample opportunity for noticing and correcting any deficiency. The natural inference is that Congress saw the present tense of Sections 309 and 505 as no limitation on penalty actions in respect of past violations. In the circumstances, this is a reliable guide to the original intent of the Clean Water Act. *Cf. Bob Jones University v. United States*, 461 U.S. 574, 599-602 (1983), and cases cited at 601.

D. OUR CONSTRUCTION OF SECTION 505 BEST IMPLEMENTS THE CONGRESSIONAL OBJECTIVES

Needless to say, the Court cannot rewrite a statute because it believes giving the law a broader scope would be better policy. On the other hand, it must be right to

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[11] The Senate Report (No. 50, *supra*, at 28) explicitly states that the preclusive effect of an administrative penalty action does not apply to a citizen suit "for a past violation of another pollutant parameter (even one resulting from the same discharge which is the subject of the administrative civil penalty proceeding)."

resolve any genuine ambiguity by ascribing to Congress the intent to achieve the result that apparently best serves the public interest. Surely, no one can fault us for indulging a presumption in favor of our legislators as wise and public-spirited statesmen. It is therefore appropriate to test the conflicting interpretations of the statutory provision against the presumed purposes of the legislation.

1. There is no mystery about the objective of the Clean Water Act amendments of 1972 wholly to eliminate the pollution of navigable waters within a dozen years, and, to that end, to enlist federal, state and private incentives. *See* Sec. 101(a)(1), 33 U.S.C. 1251 (a)(1); *Train v. City of New York*, 420 U.S. 35, 37, 45-46 and n.10 (1975); *EPA v. State Water Resources Control Board*, 426 U.S. 200, 203-209 (1976); *E.I. du-Pont de Nemours and Co. v. Train*, 430 U.S. at 116, 132-133; *Milwaukee v. Illinois*, 451 U.S. 304, 317, 319 (1981); *Sea Clammers*, 453 U.S. at 13-14; *International Paper Co. v. Ouellette*, No. 85-1233, slip op. 6, 7, 15 n.18 (Jan. 21, 1987). Not unimportant in this comprehensive scheme is the provision for citizen suits, whose function is not to compensate adversely affected persons, but to enlist them as "private Attorneys General" in aid of government plaintiffs or in their place, should they default. *Sea Clammers*, 453 U.S. at 15-17. *See also id.* at 14 n.23. Thus, it seems obvious a private plaintiff, if he is to be an effective substitute, must have the same litigating weapons as the government itself. Nor ought we assume that the launcher for the most important of the weapons—civil penalties—was rendered all but inoperative before being turned over to the citizen. *See* pp. 12, 13-14, *supra*.

2. There is, moreover, a very practical objection to petitioner's reading—which cannot have escaped the eye of Congress. It is this: in most cases, the fact of exces-

sive discharges is known to the public only through the required discharge monitoring reports (DMRs); but the underlying water samplings are usually at least days, and may be weeks or even months, apart and the reports are typically filed a month or more after the sampling event. *See* S. Rep. No. 414, *supra*, at 11. In the circumstances, it would be most odd to require the plaintiff to allege what he cannot yet know, the present continuation of previous excessive discharges revealed by the most recent reports, which may be quite stale. In fact, because of the retrospective nature of monitoring and of calculating the monthly average, the operator himself is often uncertain whether he has ceased excessive discharges until the last samplings are taken, after a citizen suit has been filed.

Nor is that all. Suppose the violator, forewarned by a citizen's statutory notice, temporarily desists, albeit with every intention of resuming his excessive discharges once the threat of litigation has receded.[12] And let us further suppose that the temporary cessation of polluting activity is sufficiently made plain that the potential citizen plaintiff cannot in good faith allege a presently continuing violation. Is this simple scenario sufficient to evade the Clean Water Act when governmental authorities stand aside?[13] In legislation that takes itself seriously, a nega-

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[12] It might be suggested that the potential citizen plaintiff need only remain poised to file this suit as soon as excessive discharges resume. But, because the DMRs always relate *past* violations, the current status can never be known. Moreover, the effectiveness of the statutory notice may lapse after a time and a fresh 60-day notice might be then required before suit. *Cf.* Section 309(g)(6)(B)(ii) of the Act added by Sec. 314 of the Water Quality Act of 1987, Pub. L. 100-4 (limiting the effectiveness of a notice for some purposes to 120 days). Indeed, we assume petitioner would say that the initial notice ceases to form a predicate for suit as soon as excessive discharges are halted.

[13] The problem is compounded if, as petitioner sometimes intimates, even the federal Administrator is barred from suing while

tive answer seems compelled, as Judge Williams suggested, concurring in *Hamker v. Diamond Shamrock Chemical Co.*, *supra*, 756 F.2d at 399. Yet, petitioner's construction of Section 505 forbids a citizen suit in these circumstances.

We address in a moment the concerns expressed about the potential abuses presented by unchecked citizen suits. Pp. 22-26, *infra*. But we must accept, at the outset, that the provision was intended to have a significant deterrent bite. The balance is well struck, it seems to us, by permitting the assessment of civil penalties for past violations in appropriate circumstances. Because the award is paid into the federal Treasury and is, in any event, discretionary with the court, it affords no undue incentive to the plaintiff. Yet, at the same time, the prospect of a substantial penalty will deter violations and encourage prompt curative measures, and the actual assessment of penalties will goad other dischargers into compliance. There is no reason to suppose Congress would not have intended such a salutary result.

3. As it happens, the present case tellingly illustrates the appropriateness of our reading of Section 505. As we have detailed in the Statement (pp. 3-4, *supra*), petitioner was a serious multiple violator over many years. To deal with one category of pollutants, petitioner very belatedly made relatively inexpensive improvements to its treatment system at the repeated insistence of the State authorities. J.A. 111 and n.25. Nevertheless, grossly excessive discharges had persisted without interruption for some six months thereafter when respondent served its statutory notice on February 29, 1984 (J.A. 116-117, R. 317-323). And in four of those months, there were other violations as well. *Ibid.* Nor did even the

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there is no present excessive discharge. *See* Pet. Br. 23-24 ("Even assuming *arguendo* that EPA can seek penalties for purely past violations . . .").

warning of a forthcoming lawsuit provoke immediate compliance. The monthly average permitted discharges of TKN were exceeded in March, April, and May—not to mention three violations of the much more generous one-day maximum, twice in April and once in May. *Ibid.* Petitioner did not cease excessive discharges until May 16, 1984, just a month before this suit was filed.

Such a record hardly commends itself for a ruling of total exemption from liability simply because active violations had stopped—whether temporarily or permanently only time would tell—on the day of filing. Indeed, the irony is that under petitioner's submission the present suit *would* lie if it had been instituted a month or so earlier, as the 60-day rule allowed.[14] Thus, according to this argument, the district court's jurisdiction failed only because respondents waited a little longer than the law required before filing their action. We cannot lightly ascribe such a senseless result to a rational Congress.

E. OUR CONSTRUCTION OF SECTION 505 CREATES NO RISK OF UNFAIRNESS OR ABUSE OF THE COURTS

Throughout this case, and others like it, there have been half-spoken, and wholly unsupported, suggestions that the "broad" reading of the citizen suit espoused by the courts below would work unfairness to industry and place an undue burden on the federal courts. We readily agree that the pressures on dischargers *are* measurably greater because of the availability of private lawsuits. If it were otherwise, there would be no point in permitting such actions. And, obviously enough, these suits do, in some degree, increase the volume of federal court litigation under the Clean Water Act. Again, however, it is

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[14] The statutory notice having been served on the last day of February 1984, the 60-day period elapsed at the end of April. Had the suit been filed then or any time in the following two weeks, petitioner would have been "caught red-handed."

plain Congress determined that this was an acceptable cost, and the Court cannot be asked to defeat the legislative scheme in the name of protecting overburdened judges. But, it need hardly be said, there are limits. It *would* be difficult to defend a construction of Section 505 that produced a deluge of essentially pointless litigation. We ought not suppose Congress is so callous toward unjust harassment or so heedless of the problems of a coordinate branch.

1. In the present context, no such risk is presented. There is no real incentive for the filing of a citizen suit against a one-time polluter who has long since mended his ways. If deterrence of future violations is unnecessary, the private plaintiff has little or nothing to gain by seeking an award of statutory penalties that will not come to him. There is, as this Court has firmly held, no possibility of obtaining compensation for past injury through the recovery of damages, whether under the Act or federal common law. *Sea Clammers, supra.*[15] And even the expenses of litigation can be refused if the court concludes that the action served no purpose; indeed, the initiator of merely harassing litigation can be required to pay the costs and attorney fees incurred by the defendant, as well as his own. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 692-693 and n.13 (1983); *id.* at 707 (Stevens, J., dissenting).

Nor need we rely entirely on the self-interest of potential plaintiffs. The courts are not helpless to deal with

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[15] Settlement payments earmarked for specific environmental purposes are no exception. These are simply contributions to particularized *public* programs, not compensation for private injury. In specified circumstances, such "alternative payments" continue to be encouraged by EPA (*see* EPA Civil Penalty Policy, *supra*, at 3002-3003), and, at all events, have been endorsed by Congress as furthering the objectives of the Clean Water Act. H.R. Rep. No. 1004, *supra*, at 139.

silly or vindictive lawsuits. Proof of an excessive discharge in the past does not *require* the imposition of a penalty: although the violator is "subject to" such an assessment (Sec. 309(d), 33 U.S.C. 1319(d)), it is for the court to decide, in each case, whether an award is "appropriate." Sec. 505(a), 33 U.S.C. 1365(a). The court may well determine against a penalty if the violation is isolated or if effective corrective measures were promptly taken some time ago.

Moreover, dismissal of unnecessary lawsuits is not the only deterrent. As we have just noted, the court may also assess all the costs and legal expenses of vexatious litigation against the plaintiff. Indeed, Congress believed this prospect would keep the balance right. *See Ruckelshaus v. Sierra Club*, *supra*; S. Rep. No. 414, *supra*, at 81.[16]

Finally, it ought to be said that the available evidence does not remotely support the "floodgates" argument suggested. It is not irrelevant that the construction of Section 505 espoused by the courts below has also been adopted by most of the lower federal courts on the front line, in the best position to notice unfairness and to feel any excessive burden.[17] Yet, there has been no unman-

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[16] Contrary to the contentions in some of the briefs, citizen plaintiffs are not so irresponsible as to initiate actions after merely "leafing through" the DMRs filed by permittees (Pet. Br. 44), or to ignore the factors taken into account by the government when bringing suit. *See* Br. A.C. of Rollins Environmental Services (N.J.) 13-15. As an example, the present case resulted from a review by respondents of roughly a hundred major dischargers on Chesapeake Bay. Serious violators were pinpointed, and their compliance records and facilities discussed with state officials. Six notice letters were sent resulting in judicial or administrative enforcement actions either by respondents or the government, or both, in all six cases. *See* J.A. 53-54.

[17] *See Friends of the Earth v. Archer Daniels Midland Co.*, 24 Env't Rep. Cases (BNA) 1993, 1995-1996 (N.D.N.Y. 1986); *Locust*

ageable volume of private enforcement actions.[18] And, at all events, in a recent assessment of citizen suits under the Act, Congress had declared itself well satisfied with the result. *See* S. Rep. No. 50, *supra*, at 28. *See also* 131 Cong. Rec. S-12026 (daily ed. Sept. 24, 1985). The proof of the pudding is in the eating.

Lane v. Swatara Township Authority, 636 F. Supp. 534, 539 (M.D. Pa. 1986); *State of Alabama ex rel. Graddick v. Veterans Administration*, 648 F. Supp. 1208, 1211 (M.D. Ala. 1986); *Student Public Interest Research Group v. Jersey Central Power & Light Co.*, 642 F. Supp. 103, 107 (D.N.J. 1986); *Student Public Interest Research Group v. P.D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074, 1083-1084 (D.N.J. 1986); *Connecticut Fund for the Environment and NRDC v. Job Plating Co.*, 623 F. Supp. 207, 213-214 (D. Conn. 1985); *Fishel v. Westinghouse Electric Corp.*, 617 F. Supp. 1531, 1540-1541 (M.D. Pa. 1985); *Sierra Club v. Hanna Furnace Corp.*, 636 F. Supp. 527, 529-530 (W.D.N.Y. 1985); *Sierra Club v. Simkins Industries, Inc.*, 617 F. Supp. 1120, 1126-1127, 1131-1132 (D. Md. 1985); *Sierra Club and NRDC v. C.G. Manufacturing Co., Inc.*, 638 F. Supp. 492, 494 (D. Mass. 1985); *Student Public Interest Research Group v. American Cyanamid Co.*, 23 Env't Rep. Cases (BNA) 2044, 2049 (D.N.J. 1985); *Student Public Interest Group v. AT&T Bell Laboratories*, 617 F. Supp. 1190, 1194-1199 (D.N.J. 1985); *Student Public Interest Research Group v. Georgia Pacific Corp.*, 615 F. Supp. 1419, 1425-1426 (D.N.J. 1985); *Student Public Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1474, 1476-1477 (D.N.J. 1985); *Student Public Interest Research Group v. National Starch and Chemical Corp.*, 23 Env't Rep. Cases (BNA) 1982, 1984 (D.N.J. 1985); *Student Public Interest Research Group v. Tenneco Polymers*, 602 F. Supp. 1394, 1399 (D.N.J. 1985); *Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284, 286-287 (N.D.N.Y. 1984); *Friends of the Earth v. Facet Enterprises, Inc.*, 618 F. Supp. 532, 535 (W.D.N.Y. 1984); *Sierra Club v. Aluminum Co. of America*, 585 F. Supp. 842, 853-854 (N.D.N.Y. 1984); *Sierra Club and NRDC v. Raytheon*, 22 Env't Rep. Cases (BNA) 1050, 1053-1055 (D. Mass. 1984); *Student Public Interest Research Group v. Anchor Thread Co.*, 22 Env't Rep. Cases (BNA) 1150, 1154 (D.N.J. 1984).

[18] To be sure, the number of citizen suits tends to increase when government defaults. That is as it should be. Even so, however, the actual volume of private actions in the past few years has been relatively moderate.

2. The present case, as we have sufficiently detailed (pp. 2-5, 21-22, *supra*), is much too egregious to support a credible claim that petitioner has been the victim of vexatious litigation. Although, as it turned out, active violations had ceased a month before suit was filed, there was then good cause to fear that excessive discharges would continue in the future if petitioner were not restrained by injunction or deterred by an assessment of penalties. This is enough to dispose of the case. But we cannot join the United States in its submission that Section 505 ought to be read as permitting citizen suits only in like circumstances.[19]

For our part, we believe there is no warrant for imposing such a limitation, at least as a *jurisdictional* matter. Thus, in the present case, we submit it does not matter whether, on June 15, 1984, when the suit was filed, respondents believed excessive discharges were still occurring or, rather, had been halted in light of the 60-day warning letter. Nor can we accept as dispositive the presence or absence of a reasonable fear about the violations of the past continuing into the future, whether or not they have stopped for the moment. That is, of course, the primary test for the court in deciding whether a permanent injunction is appropriate, and it may also be an ingredient in fixing any penalty award. But we cannot suppose an assessment of civil penalties

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[19] At this writing, we have not seen the brief for the United States in this Court and therefore must rely on its submission below. We assume the Government will, in effect, endorse the rule announced by the First Circuit in the *Pawtuxet Cove* case, *supra*, and will argue, contrary to petitioner, that applying that decision here requires affirmance. Although grateful for this support, so far as it goes, we surmise that conflicting interests within the Government have, once again, led to an unrealistic search for a "middle ground." *Cf. International Paper v. Ouellette*, *supra*, slip op. at 16 n.19.

is *always* wrong when future compliance is assured, for that would unduly excuse, and effectively reward, deliberate delay in taking necessary corrective action until a lawsuit was imminent—and thereby importantly retard the achievement of the Congressional objective. At all events, however, we submit these are questions of *remedy*, not of *jurisdiction*. *Cf. Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

Indeed, once we get beyond the prison of the present tense in Section 505, there is no textual basis for requiring, as a basis for jurisdiction, any particular belief about *future* violations. As we read the provision, it gives the district court jurisdiction to entertain a private suit against an alleged violator of the Clean Water Act, provided only a 60-day notice has been served and neither government is diligently prosecuting a like action. Whether the citizen suit will *succeed* is another matter. In due course, it may become necessary for this Court to give guidance as to the circumstances that justify any remedial order, and, specifically, the assessment of civil penalties. But this is surely not that case. In this Court, at least, no argument is advanced that a penalty order, or the amount of the award, was improper if the district court had jurisdiction of the case. Pet. Br. 7 n.8.[20] And this, we may add, was no imprudent concession.

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[20] We charitably overlook feeble attempts to complain about the assessment without formally challenging it. *E.g.*, Pet. Br. 33 n.42, 44.

CONCLUSION

For the reasons stated, the judgment of the court of appeals affirming the decision of the district court should be affirmed.

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No. 86-473

In The
Supreme Court of the United States
October Term, 1987

SIERRA CLUB,
Petitioner,
v.
SHELL OIL COMPANY,
Respondent.

SIERRA CLUB,
Petitioner,
v.
MONOCHEM, INC.,
Respondent.

SIERRA CLUB,
Petitioner,
v.
COPOLYMER RUBBER AND CHEMICAL CORP. *et al.*,
Respondent.

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INTRODUCTION

This case raises the identical issue to that in *Gwaltney v. Chesapeake Bay Foundation and Natural Resources Defense Council, Inc.*, No. 86-473, scheduled for oral argument on October 5, 1987. Sierra Club urges this Court to grant the writ to allow the decision below to be modified in light of the decision in *Gwaltney*.

The decision below requires reversal no matter what the outcome in *Gwaltney*. The court below effected a radical shift in the law. It read the strict liability provision out of the Clean Water Act, and instead apparently required a citizen plaintiff in a civil action to prove the elements the government must prove in a criminal prosecution. The opinion below reversed the burden in a citizen enforcement case, contrary to the statute and the settled law in all other courts.

———o———

ARGUMENT

I. The Fifth Circuit Is The Only Court That Has Read The Strict Liability Standard Out Of The Clean Water Act.

The fundamental error of the Fifth Circuit in the cases below was to remove from the Act strict liability for violating an NPDES permit. Until the court decided the case below, it was a simple matter to determine whether a polluter was liable. If he had violated his permit, he had violated the Act. *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 (1976). The defendants' own discharge monitoring reports were used to establish liability. *U.S. v. Ward*, 448 U.S. 242, 251-55 (1980).

All the District and Circuit Courts except those in the Fifth Circuit, have found that liability is judged on a strict liability basis. The reason is simple. The Act's permit requirements "were written without regard to intentionality . . . making the person responsible for the dis-

charge of any pollutant strictly liable." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979).[1]

The reason Congress wrote the Act with a strict liability standard is straightforward: to make permit enforcement simple, certain and swift. As the D.C. Circuit put it, permits could not be enforced if enforcement "depend[ed] on murky determinations concerning the sequence of events in the plant, whether those events would have been avoidable if other equipment had been installed . . ." and so on. *Weyerhaeuser v. Costle*, 590 F.2d 1011, 1058 (D.C. Cir. 1978).

What strict liability means is that a defendant's efforts, whatever they might have been, and the problems in its plant, whatever they were, are irrelevant to a judgment of liability. The only relevant question is whether the defendant has exceeded its permit; if it has, it is liable. Questions of good faith, reasonable efforts, and so on, are relevant to determining only the size of the penalty. See Water Quality Act of 1986, Pub. L. No. 100-4, § 313(c) (1987), codified at 33 U.S.C. § 1319(d). They do not arise when determining liability.

The Fifth Circuit would remove strict liability from the Act. Under the guise of determining whether the defendant is "in violation" at the time of suit, the Fifth Circuit requires that a demonstration be made that violations are the "product of [defendant's] systematic neglect of discharge limitations or of inadequate pollution control facilities." 817 F.2d 1169 at 1173, 74. This is precisely the "murky determination" that the D.C. Circuit, in *Weyerhaeuser*, said would make permit enforcement unworkable. It would.

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1. See also *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1374-77 (D.C. Cir. 1977); *State of New York v. Shore Realty Corporation*, 759 F.2d 1032, 1042 (2d Cir. 1985); *Chesapeake Bay Foundation and Natural Resources Defense Council v. Bethlehem Steel Corporation*, 608 F. Supp. 440, 451-53 (D.Md. 1985); *Connecticut Fund for the Environment and Natural Resources Defense Council v. The Job Plating Company*, 623 F. Supp. 207, 218 (D.Conn. 1986).

This error is perhaps most clearly illustrated in the following way. There is a narrow exception to strict liability for permit violations known as the "upset" defense. Codified at 40 C.F.R. 122.41(n)(1), the burden is explicitly placed on a defendant to show, as part of the defense, that its violations were not caused by "operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operators". Yet these are just the kinds of things—"systematic neglect"—that the court would make a plaintiff show before liability could attach. The court below has reversed the statutory burdens.

The court below strikes the strict liability standard from the Act for citizen suits, and requires some vaguely defined demonstration of willfulness or negligence. Willful or negligent conduct, however, is separately punishable under the Act with criminal penalties. 33 U.S.C. § 1319(c)(1). See also *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979). Citizens, of course, may not bring criminal actions under the Act. Yet the showing that the court below requires a citizen plaintiff to make in a civil suit sounds like that required for a criminal prosecution.

A model of how to read the Act's enforcement scheme, which directly conflicts with the decision below, is provided by a recent Ninth Circuit case. In *Sierra Club v. Union Oil Company of California*, 813 F.2d 1480 (9th Cir. 1987), the district court had engaged in a trial, much along the lines required by the court below. It had excused all the defendant's violations. The Ninth Circuit reversed on all grounds, and held Union Oil liable for all alleged violations, by comparing its discharge monitoring reports to its permits.

What the Ninth Circuit said of one excuse—sampling error—applies to all the excuses allowed by the court below:

> Were we to accept Union Oil's argument regarding the use of sampling errors to excuse reported permit exceedances, we would be sanctioning countless additional hours of NPDES litigation and creating

> new, complicated factual questions for district courts to resolve. As indicated by the legislative history, Congress hoped to limit such situations. In addition, if each self-monitoring report is to be considered only prima facie rather than conclusive evidence of an exceedance of a permit limitation, citizen groups like the Sierra Club would be taking a considerable risk whenever they initiated a citizen enforcement action pursuant to 33 U.S.C. § 1365. While a permittee's publicly filed reports might clearly indicate that illegal pollution was taking place, the permittee might have additional information unavailable to citizen groups indicating that sampling error rendered the reports meaningless. Finally and most importantly, allowing permittees to excuse their reported exceedances by showing sampling error would create the perverse result of rewarding permittees for sloppy laboratory practices. Such an approach would surely undermine the efficacy of the self-monitoring program.

813 F.2d at 1492. The Ninth Circuit has read the Act correctly; the Fifth Circuit has rewritten it.

II. The District Court's Power To Impose Penalties In Permit Enforcement Cases Is The Same Whether The Case Is Brought By The Attorney General Or By A Private Attorney General.

The court below moved from the observation that citizens do not have the full enforcement powers of the government to the conclusion that in citizen suits—and only in citizen suits—the court must hold a trial to judge whether the defendant is "in violation" at the time of suit. This is a non sequitur.

Sierra Club has never argued that the citizen suit contains the full armamenterium of enforcement powers available to the federal government. Citizens cannot bring criminal actions or issue administrative orders. They must give 60 days notice of intent to sue and demonstrate standing. The government may preclude a citizen suit by filing an action in court during the 60-day notice period.[2]

2. In such a case the citizen may intervene as of right. 33 U.S.C. § 1365(b)(1)(B).

So much is obvious. But these restrictions say nothing about the powers of the district court in a properly commenced citizen enforcement action.

Once a citizen has given notice, filed an action, and shown standing, the district court has precisely the same power to impose penalties in a permit enforcement case brought by the government or by a citizen. This could not be more straightforward in the statute. Section 309(d) of the Act, 33 U.S.C. § 1319(d), authorizes the court to impose penalties in a government action against one who "violates" the Act. The citizen suit provision, empowers the court to impose "*any* appropriate civil penalties under [Section 309(d) of the Act] Section 1319(d)." Section 505(a) of the Act, 33 U.S.C. § 1365(a) (emphasis added). The statute could not be clearer. *The remedies in permit enforcement cases, whether brought by the attorney general or private attorney are the same.*[3]

III. The Cases Below Should Be Reversed Even If Gwaltney Is Reversed.

Even if this Court decides that the Fourth Circuit is in error in *Gwaltney v. Chesapeake Bay Foundation and Natural Resources Defense Council*, No. 86-473, the decision below should be reversed. Although it is not obvious in reading respondents' opposition to the petition for certiorari, or in reading the opinion below, every one of the respondents violated its permit *both before and after* the re-

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3. In its amicus brief in *Gwaltney*, the United States has argued that the district court has the power to impose penalties in citizen suits only if there is an allegation of an ongoing violation. Because the United States has facilities throughout the country subject to NPDES permits, it is a potential defendant. See 33 U.S.C. § 1323. It is understandably not enthusiastic about the power the district court has in citizen actions. One such action illustrates the problem. California, as a citizen, sued the Navy for violating a permit involving discharges into San Francisco Bay. The Navy maintains that it ceased discharges just prior to suit, and that California knew the violations would not continue. The United States thus claims that the district court lacks jurisdiction over its actions. The district court dismissed the action, California appealed, and the Ninth Circuit is awaiting the outcome of *Gwaltney*. *California v. United States Department of the Navy*, No. 86-1972 (9th Cir.).

spective complaints were filed; several violated during the month the complaint was filed. Even if this Court reverses *Gwaltney*, and holds that some "continuing" violation is required for liability to attach, companies that violate their permits before and after the complaints are filed must be held liable for those violations, without a trial to determine whether the violations after the filing were produced by the same "cause" as the violations before filing.

Sierra Club believes that a polluter may be held liable for penalties under the Act until the statute of limitations expires. When one has committed a proscribed act, whether breach of contract, commission of a tort, or falsification of a tax return, one is potentially liable and remains potentially liable until either the delict is cured by penalties, damages, a prison term or some other remedy, or the statute of limitations has expired. See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944).

The same is true of the civil penalty remedy under the Clean Water Act. One holds a permit, which makes it a requirement of federal law to discharge no more than a certain amount of specific pollutants. If one exceeds those amounts, one is potentially liable for the imposition of a civil penalty payable to the United States Treasury in a suit brought by the government or by a private attorney general until the statute of limitations has run out.[4]

The errors in the opinion below trace their origin to an earlier Fifth Circuit decision, *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985). In an attempt to bar the plaintiffs' state law damage claims, the panel in *Hamker* applied the notion appropriate for

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4. District courts in the Second and Fourth Circuit have agreed with Sierra Club's argument that the applicable statute of limitations is prescribed at 28 U.S.C. §2462, and is five years. *See, e.g., Connecticut Fund for the Environment and NRDC v. Job Plating Company*, 623 F. Supp. 207, 211-13 (D.Conn. 1985) and *Chesapeake Bay Foundation and NRDC v. Bethlehem Steel Corporation*, 608 F. Supp. 440, 446-50 (D.Md. 1985).

injunctive remedies—continuity in violation—instead of the standard appropriate to penalties and all other non-injunctive relief in American law—whether the statute of limitations has expired. The court below broadened *Hamker's* mistaken "continuing violation" requirement to effect a radical change in the statute.

IV. The Citizen Suit Provision Is Not Unconstitutional.

1. Cases On The Separation Of Powers.

Two recent cases of this Court explore the separation of powers doctrine: *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Bowsher v. Synar*, 106 S.Ct. 3181 (1986).

Both *Buckley v. Valeo* and *Bowsher v. Synar* involve variations on the problems of whether the Congress can by statute give executive powers to persons that it and not the President appoints to office. In *Buckley v. Valeo*, the separation of powers problem centered on a provision of the Federal Elections Campaign Act. The statute created a Federal Elections Commission with broad powers of adjudication, rulemaking and enforcement. The Commission was made up of eight persons, of which only two were appointed by the President. This Court found that this structure was unconstitutional. The essential reason was that executive functions created by the statute were to be carried out by persons who were the designees of Congress.

With respect to the institution of civil litigation to enforce the statute, the sole prosecutorial discretion was vested in the Commission. Congress in effect was both writing and enforcing the law. *Buckley v. Valeo* decided that Congress may not pass a statute that creates public law, and vests enforcement of that public law exclusively in the hands of its own appointed officials.

Bowsher v. Synar, 106 S.Ct. 3181 (1986), addresses whether Congress can delegate to the Comptroller General, an official appointed by and dismissable by Congress, the power to designate mandatory cuts in the federal budget. For reasons analogous to those in *Buckley v. Valeo*, this Court held that the delegation to the Comptroller General

was unconstitutional because it allowed the Congress to retain control over a decision that was inherently executive. 106 S.Ct. at 3192.

Read together, *Buckley v. Valeo* and *Bowsher v. Synar* stand for the proposition that under the Constitution Congress has the power to pass laws. It has neither the power to enforce them in court, nor execute them, through officers whom it appoints.

2. The Separation Of Powers Cases Are Irrelevant In This Case.

Buckley v. Valeo and *Bowsher v. Synar* are without application to the citizen suit provision of the Clean Water Act. There are two reasons. First, citizens are not agents appointed and dismissable by Congress, but entirely independent actors. Second, and more fundamentally, citizens under the citizen suit provision do not sue to enforce what *Buckley v. Valeo* calls "public law." They sue instead to vindicate statutory rights that they have as individuals.

a. The People Are Not An Agent Of Congress.

Both *Buckley v. Valeo* and *Bowsher v. Synar* stress the degree of control that Congress retained over the persons to whom it had delegated duties to carry out or enforce the law. The question in each case was whether it had retained too much control over execution or enforcement of the law; the answer in each was yes, because the persons executing or enforcing the law were dependent for their offices upon Congress. Nothing could be further from these facts than the present case. It would be absurd to say that citizens are answerable to Congress in such a way that Congress has arrogated to itself the civil enforcement power under the Clean Water Act.

On the contrary, the executive can issue administrative enforcement orders, can bring criminal actions, can bring civil actions, can preclude citizen suits by filing first, and can intervene in any civil action brought by a citizen. 33 U.S.C. §§ 1319; 1365. Unlike the situation in *Buckley*

v. Valeo, Congress had hardly arrogated to itself all of the civil enforcement powers that appropriately reside in the Attorney General. The Executive, not Congress, has them.

Moreover, the citizenry is not an agent of Congress as was the Federal Election Commission in *Buckley v. Valeo* or the Comptroller General in *Bowsher v. Synar.* To suggest that citizens are the agents of Congress is to get everything backwards.

b. The Citizen Suit Provision Gives Persons The Right To Sue For Injuries To Their Own Interests.

Perhaps the deeper reason that the respondents' argument is wrong is that it takes no account of what the citizen suit provision gives a citizen the right to do.

The citizen suit provision gives the right to bring a civil action to a citizen whose interests are or may be adversely affected by a defendant's pollution in violation of the law. 33 U.S.C. § 1365(a), (g). This statutory requirement of an individualized interest is connected with the standing requirements of the citizen suit provision. To have standing, a person must, for purposes of Article III, have a cognizable interest, whether aesthetic, environmental, recreational, or some other, in the resource for the protection of which he institutes suit. *Sierra Club v. Morton,* 405 U.S. 727 (1972); *Sierra Club v. SCM Corporation,* 747 F.2d 99, 105-107 (2nd Cir. 1984).

In other words, the citizen suit provision gives individual persons the right to sue "*on his own behalf,*" Section 505(a) of the Act, 33 U.S.C. § 1365(a) (emphasis added), those who pollute waters with which the person bringing the suit has some real connection. Plaintiffs in a permit enforcement suit are the beneficiaries of a legislative grant of standing. Congress intended both general and specific deterrence to result from permit enforcement, and citizen plaintiffs benefit, with the other members of the public, from a successful prosecution. *SPIRG v. AT&T Bell Laboratories,* 617 F. Supp. 1190, 1200 (D.N.J. 1985);

SPIRG v. P.D. Oil and Chemical, 627 F. Supp. 1074, 1083 (D.N.J. 1986). Put differently, citizens may not sue on some theory of public law: if I live in Maryland, I may not sue a polluter in Texas merely because he is violating the law. Some showing of a personal interest adversely affected would be required. *Sierra Club v. SCM Corporation*, 747 F.2d 99, 105-107 (2nd Cir. 1984).

That persons are suing in their own behalf is a complete answer to the respondents' argument. Congress can create a statutory right, the violation of which gives rise to standing to sue for the vindication of the right. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). It has given such a right and the opportunity for redress in the Clean Water Act.

CONCLUSION

Because the opinion below requires reversal no matter what the outcome in *Gwaltney*, this Court should grant the writ requested.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD., PETITIONER

v.

CHESAPEAKE BAY FOUNDATION, INC. AND
NATURAL RESOURCES DEFENSE COUNCIL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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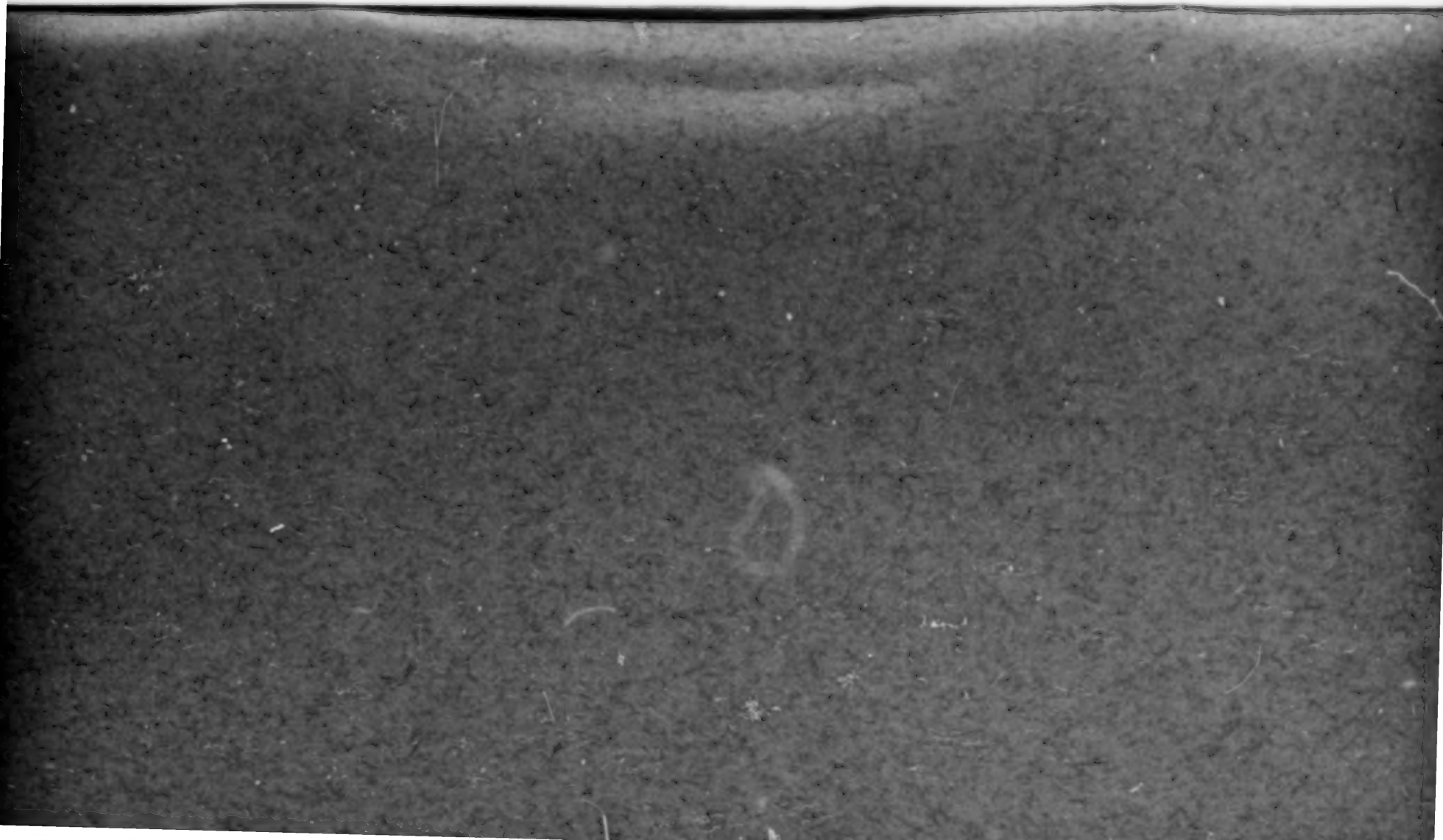

QUESTION PRESENTED

Whether a district court must dismiss a Clean Water Act citizen enforcement action against a defendant that has continuously violated its discharge permit unless the citizen demonstrates that the defendant has committed discrete permit violations on or after the day the complaint was filed.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-473

GWALTNEY OF SMITHFIELD, LTD., PETITIONER

v.

CHESAPEAKE BAY FOUNDATION, INC. AND
NATURAL RESOURCES DEFENSE COUNCIL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

The United States plays a lead role in enforcing the Clean Water Act, 33 U.S.C. (& Supp. III) 1251 *et seq.* (CWA). See CWA § 309, 33 U.S.C. 1319. It is also a potential defendant in citizen enforcement actions against federal facilities. See CWA § 313, 33 U.S.C. 1323; CWA § 505, 33 U.S.C. 1365. The present case, in which the United States participated as amicus curiae in the court of appeals, concerns the jurisdictional prerequisites for a private suit brought to obtain compliance with the Clean Water Act. Its resolution will have a direct and substantial effect on systematic enforcement of the Act.

STATEMENT

The Clean Water Act permits private citizens to bring civil actions in certain situations to enforce the Act's pollution control requirements. In this instance, respond-

ents Chesapeake Bay Foundation, Inc. and the Natural Resources Defense Council, brought an action against Gwaltney of Smithfield, Ltd., requesting the court to enjoin Gwaltney's pollution discharges and to assess civil penalties. The district court entered partial summary judgment finding Gwaltney to have violated and to be in violation of the Act and held a trial to determine an appropriate remedy. Gwaltney then moved to dismiss the action, arguing that the court lacked subject matter jurisdiction because Gwaltney had not exceeded its discharge permit limitations since the suit was filed. The district court denied Gwaltney's motion, assessed a $1.3 million penalty, and ordered the company to provide respondents with monthly discharge monitoring reports indicating Gwaltney's compliance status. The court of appeals affirmed.

A. The Clean Water Act's NPDES Program

The Clean Water Act creates a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (CWA § 101 (a), 33 U.S.C. 1251(a)).[1] As a part of that program, Section 301(a) of the Act prohibits all discharges of pollutants into navigable waters except those made in compliance with other sections of the Act, including Section 402, which establishes the National Pollutant Discharge Elimination System (NPDES) (33 U.S.C. 1342). See 33 U.S.C. 1311(a).

Section 402(a) provides that the Environmental Protection Agency (EPA) shall issue NPDES permits authorizing effluent discharges in strict compliance with conditions specified in the permit. 33 U.S.C. 1342(a).[2]

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[1] The Clean Water Act was recently amended and reauthorized through the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7, which has not yet been officially codified. We shall cite to the Statutes at Large in describing relevant sections of that Act.

[2] See generally *International Paper Co.* v. *Ouellette*, No. 85-1233 (Jan. 21, 1987), slip op. 7-9; *EPA* v. *California ex rel. State Water*

Section 402(b) allows each State to develop and administer its own permit program, provided that the program meets federal requirements. 33 U.S.C. 1342(b). And Section 402(c) provides that EPA shall suspend issuance of federal permits upon determining that a State has adequate authority to implement and enforce the permitting program within the State. 33 U.S.C. 1342(c).[3]

If a NPDES permit holder fails to comply with the specified permit conditions, the federal and state governments may take enforcement action. Section 309 of the Clean Water Act empowers EPA to enforce a federal or state permit through a variety of administrative, civil, and criminal mechanisms. See 33 U.S.C. 1319. A state may take similar action, under appropriate state law, in response to a violation of a state-issued permit. See CWA § 402(b)(7), 33 U.S.C. 1342(b)(7). In addition, Section 505(a)(1) of the Clean Water Act permits private citizens to commence a civil action in certain situations against anyone "who is alleged to be in violation of * * * an effluent standard or limitation under this chapter" (33 U.S.C. 1365(a)(1)), which includes a federal or state NPDES permit or condition thereof (33 U.S.C. 1365(f)). 33 U.S.C. 1365. Section 505 specifically authorizes the district courts to enforce the permit requirements and impose civil penalties, which are payable solely to the Treasury. 33 U.S.C. 1365.

Resources Control Board, 426 U.S. 200, 205-208 (1976). NPDES permits generally specify particular effluent parameters, including permissible concentrations of particular pollutants, based on daily and monthly averages. NPDES permits also require, pursuant to Section 402(a)(2) (33 U.S.C. 1342(a)(2)), that the permittee monitor its effluent and submit reports (typically on a monthly basis) disclosing the results. Such reports, generally known as discharge monitoring reports (DMRs), are available to any interested person upon request. See CWA § 308, 33 U.S.C. 1318; 40 C.F.R. 122.41(h)(4).

[3] If the Administrator subsequently determines that a State is failing to administer a program in accordance with federal requirements, he may, after notice to the State, withdraw approval. CWA § 402(c)(3), 33 U.S.C. 1342(c)(3).

B. The Present Dispute

The Commonwealth of Virginia has established a federally approved state NPDES program conducted through the Virginia State Water Control Board. See Va. Code Ann. §§ 62.1-44.2 *et seq.* (1982). In 1974, the Board issued an NPDES permit to ITT-Gwaltney, Inc., governing that company's discharges from its hog-slaughtering and packing plant into the Pagan River, a tributary of the James River and the Chesapeake Bay. The permit, which was reissued in 1979 and amended in August 1980, sets forth seven effluent parameters.[4] Petitioner Gwaltney of Smithfield, Ltd. (Gwaltney) assumed obligations under the amended permit on October 27, 1981, following its acquisition of the assets of ITT-Gwaltney, Inc. Pet. App. 3a-5a; J.A. 56-58, 72-74; C.A. App. 307-310.

On February 29, 1984, respondents sent a formal notice to Gwaltney, the Administrator of EPA, and the Virginia State Water Control Board, declaring respondents' intention to commence a citizen suit against Gwaltney under Section 505 of the Clean Water Act demanding that Gwaltney comply with its NPDES permit.[5] Respondents, relying on Gwaltney's own discharge monitoring reports (DMRs) (see note 2, *supra*), recited that over the previous five years Gwaltney's facility had repeatedly violated conditions of its permit limiting discharges of total Kjeldahl nitrogen (TKN), fecal coliform/chlorine, and other pollutants.[6] Respondents provided a table de-

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[4] The permit specifies effluent standards for oil and grease, total suspended solids, total Kjedahl nitrogen, biological oxygen demand, fecal coliform, chlorine, and pH.

[5] Section 505(b)(1)(A) of the Clean Water Act provides that a citizen must give 60 days' notice to EPA, the state, and the alleged violator, before commencing a citizen suit. 33 U.S.C. 1365(b)(1)(A). The citizen may not proceed with its suit if EPA or the state elects to commence its own compliance suit. CWA § 505(b)(1)(B), 33 U.S.C. 1365(b)(1)(B).

[6] The NPDES permit's limitation on TKN addresses the problem of contamination from organic nitrogen and ammonium compounds

tailing those violations. The table (which underestimated Gwaltney's actual violations) showed, for example, that Gwaltney had exceeded permit limitations 57 times in the previous 12 months, that it was in violation in 9 of those 12 months, and that it had violated its permit 36 times in the previous 3 months. Pet. App. 4a-5a, 79a-84a; Complaint Exh. A.

On June 15, 1984, respondents filed a citizen suit against Gwaltney under Section 505, requesting the district court to provide declaratory and injunctive relief requiring Gwaltney to comply with its NPDES permit, to impose civil penalties, and to award attorneys' fees and costs. Pet. App. 79a-84a. The complaint incorporated by reference the February 29, 1984, notice letter and its attached table as well as a second table indicating that Gwaltney reported 4 additional violations from February through March 1984 (Complaint ¶ 17 & Exhs. A & B). Gwaltney's subsequent DMRs revealed a total of 13 violations from February through May 1984. See J.A. 117.

The district court granted partial summary judgment on August 30, 1984, declaring Gwaltney "to have violated and to be in violation" of the Clean Water Act

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that, when released into a river, can oxidize and consume dissolved oxygen necessary to sustain fish and other river species. Gwaltney treats these nitrogen-containing compounds through retention of effluent in lagoons containing microbes that complete the "nitrification" process prior to discharge. Violations of the TKN standards represent a failure to nitrify the effluent adequately. See J.A. 110-111. The NPDES permit's limitations on fecal coliform and chlorine address the problem of biological contamination in Gwaltney's wastewater. The pork processing plant's untreated effluent contains bacterial contamination from animal wastes that can threaten public health. Gwaltney reduces these fecal coliforms through chlorination. Violations of the fecal coliform standards and the minimum chlorine standards represent a failure to provide adequate chlorination. Violations of the maximum chlorine standards represent overchlorination, which can be toxic to the river's life forms. See J.A. 100.

(J.A. 59).[7] The court then held a trial to determine an appropriate remedy. On May 16, 1985, six months after the trial but before the district court rendered its decision, Gwaltney moved for dismissal for want of subject matter jurisdiction (J.A. 69). Gwaltney asserted that Section 505(a)(1) of the Clean Water Act requires, as a jurisdictional prerequisite to a citizen suit, that the defendant be "in violation" (33 U.S.C. 1365(a)(1)) of a permit requirement at the time the suit is filed and that, because the last recorded violation cited by respondents occurred several weeks before respondents filed their complaint, the district court lacked jurisdiction.[8]

The district court denied Gwaltney's motion to dismiss and assessed a civil penalty of $1,285,322 for the company's violations of its NPDES permit (J.A. 71-120). The court concluded that Section 505 authorizes citizens to bring enforcement actions on the basis of both present and wholly past violations (J.A. 78-88). The

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[7] The court found that the Gwaltney pork processing facility had violated its NPDES permit on at least 237 occasions from January 1979 to June 15, 1984 (J.A. 58). Gwaltney did not contest the existence of the violations, but later filed a motion for reconsideration with respect to those violations that had occurred prior to its purchase of the facility (Motion For Rehearing (Sept. 4, 1984)). The court amended its order accordingly (J.A. 61-62). The parties later stipulated that between the date Gwaltney assumed responsibility for the facility and the entry of the court's partial summary judgment, Gwaltney violated the TKN standard 87 times, the chlorine standard 34 times, the fecal coliform standard 31 times, and the oil and grease standard 3 times (Pet. App. 87a).

[8] Gwaltney relied on *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985), which held that a citizen's allegation of an isolated and nonrecurring discharge of oil, resulting from a pipeline leak that occurred well before the filing of suit, was "insufficient to satisfy the section 1365 requirement that the defendant be alleged to be in violation of an effluent standard, limitation, or order" (*id.* at 397). As *Hamker* indicates, Section 505(a)(1) authorizes a citizen suit when the defendant "is alleged to be in violation" of the Act's requirements. 33 U.S.C. 1365(a)(1).

court held, in the alternative, that respondents satisfied Section 505's jurisdictional requirements because that section authorizes a private enforcement action against a defendant "who is alleged to be in violation of" permit requirements (33 U.S.C. 1365(a)(1)) and respondents' complaint contained a good faith allegation of a continuing violation (J.A. 83 n.8).[9] The court explained (*ibid.*):

> It was not until Gwaltney had experienced a full winter without problems that it could make its motion to dismiss based on its present compliance, with a secure belief that it was indeed in compliance. * * *. On these facts, the Court believes that even if Gwaltney were correct that a district court has no jurisdiction over citizen suits based entirely on unlawful conduct that occurred entirely in the past, the Court would still have jurisdiction here.

The district court then conducted a detailed review of the evidence of permit violations and assessed a civil penalty on the basis of criteria set forth in EPA's guidelines for civil penalty settlements (J.A. 89-115). See *EPA Civil Penalty Policy*, [Federal Laws] Env't Rep. (BNA) 41:2991 (June 1, 1984). The court also ordered Gwaltney to provide respondents with future discharge monitoring reports (J.A. 119-120).

The court of appeals affirmed (Pet. App. 1a-25a). The court rejected Gwaltney's argument that respondents' suit should be dismissed for lack of subject matter jurisdiction. It reasoned that Section 505's authorization of suits against persons "alleged to be in violation" (33 U.S.C. 1365(a)) of the Clean Water Act "can be read to comprehend unlawful conduct that occurred only prior

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[9] The complaint stated that Gwaltney "has continued to violate its discharge permit since [respondents'] letter dated February 29, 1984," and that respondents "believe and allege that without the imposition of appropriate fines and issuance of an injunction, [Gwaltney] will continue to violate its NPDES permit to the further injury of [respondents]" (Pet. App. 82a-83a).

to the filing of a lawsuit as well as unlawful conduct that continues into the present" (Pet. App. 8a-9a). The court concluded that this reading is consistent with the Act's structure and legislative history (*id.* at 9a-15a).[10]

The court of appeals further observed that "Section 505 actually confers jurisdiction in cases of a person '*alleged* to be in violation' of an effluent standard" (Pet. App. 7a n.9 (emphasis in original)). It noted the district court's alternative holding that a citizen may meet Section 505's jurisdictional requirements through a good faith allegation of a present violation (*ibid.*). The court stated that a "very sound argument can be made that [respondents'] allegations of continuing violations were made in good faith" (*ibid.*), despite the absence of a permit violation at the time the complaint was filed, because "it was not at all clear at the time of filing in June 1984, that Gwaltney's new and unproven water treatment facilities would survive the coming winter without mishap" (*ibid.*). The court determined, however, that because Section 505 permits citizen suits seeking civil penalties for past violations, "we need not decide whether plaintiffs in this case made their allegations of continuing violations in good faith" (*ibid.*).

Finally, the court of appeals concluded that the district court did not abuse its discretion in setting the amount of the civil penalty (Pet. App. 22a-25a).

SUMMARY OF ARGUMENT

Section 505 of the Clean Water Act states that "any citizen may commence a civil action on his own behalf * * * against any person * * * who is alleged to be in violation of" the Act's requirements. 33 U.S.C. 1365. The sole question in this case is whether a district court

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[10] The court acknowledged the Fifth Circuit's contrary holding in *Hamker* (see note 8, *supra*) but concluded that the case was arguably distinguishable and, in any event, should not be followed (Pet. App. 15a-18a).

must dismiss a citizen suit against a company that has continuously violated its Clean Water Act discharge permit unless the citizen demonstrates that the company has committed discrete permit violations on or after the day the complaint was filed. We submit that Section 505 quite clearly allows a citizen to initiate an action upon an allegation of a continuing violation. The citizen's allegation, if made in good faith and well grounded in fact, states a cause of action within the district court's jurisdiction. A court's jurisdiction may, of course, abate if the citizen's action becomes moot during the judicial proceedings. However, it is quite clear from the record here that this citizen action did not become moot.

Our analysis proceeds from the content and structure of the Clean Water Act's enforcement provisions. Congress has vested the EPA and the individual states with primary responsibility for enforcement of the Clean Water Act. CWA § 309, 33 U.S.C. 1319. The federal and state governments have broad authority to abate present violations through administrative and judicial actions and to penalize past noncompliance through criminal and civil penalties. See *ibid.* Congress has also authorized private citizens to join in the enforcement effort in certain limited circumstances. Section 505 of the Clean Water Act specifically authorizes private citizens to commence an enforcement action against persons who are "alleged to be in violation" of the Act. 33 U.S.C. 1365.

We believe that Section 505 requires a citizen to allege, as an essential element of his private enforcement action, that the defendant is presently failing to comply, on a continuous or intermittent basis, with the Act's requirements. That allegation, when made in good faith and well grounded in fact, states a cause of action within a federal court's subject matter jurisdiction. The plain language of Section 505 quite clearly specifies that the citizen need only allege—and not prove—present noncom-

pliance to state a cause of action. Section 505's legislative history and the Clean Water Act's overall structure and objectives fully support that interpretation.

The respondents here properly alleged that Gwaltney was failing to comply with its pollution discharge permit and therefore stated a cause of action within the district court's jurisdiction. Gwaltney's unrelenting pattern of violations, which—despite respondents' notice of intent to sue—continued up to the time the complaint was filed, fully established the reasonableness of respondents' allegations. Indeed, the district court ruled, on respondents' uncontested motion for summary judgment, that Gwaltney was "in violation" of the Act (J.A. 58).

The only remaining question is whether Gwaltney's subsequent claims of compliance should have divested the court of jurisdiction. That question is answered by applying well established mootness principles to the facts of this case. We believe that Gwaltney failed to show that the citizen's action was moot.

ARGUMENT

SECTION 505 OF THE CLEAN WATER ACT AUTHORIZES CITIZENS TO MAINTAIN A PRIVATE ENFORCEMENT ACTION AGAINST A COMPANY THAT REPEATEDLY VIOLATES ITS DISCHARGE PERMIT EVEN IF THE COMPANY COMMITS NO DISCRETE PERMIT VIOLATIONS ON OR AFTER THE DAY THE COMPLAINT IS FILED

A. The Clean Water Act Gives EPA And The Individual States Primary Responsibility For Ensuring Effective Enforcement Of The Act's NPDES Permit Program

The Clean Water Act establishes " 'an all-encompassing program of water pollution regulation.' " *International Paper Co.* v. *Ouellette*, No. 85-1233 (Jan. 21, 1987), slip op. 9 (quoting *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 318 (1981)). It contains "unusually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and private citi-

zens." *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981); accord *International Paper*, slip op. 10. As one would expect, EPA and the individual states have primary responsibility for enforcement of the Clean Water Act's NPDES permit program. *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392, 395 (5th Cir. 1985). Section 309 of the Act establishes five distinct federal enforcement mechanisms, allowing EPA to take action appropriate to the characteristics of the particular compliance problem. And Section 402 requires the states to provide similar remedies in formulating their own NPDES programs for EPA approval.

Section 309 sets forth two methods for EPA to ensure present and future compliance with permit requirements. Section 309(a) provides that when the Administrator of EPA discovers that any person "is in violation" of a federal or state NPDES permit requirement, "he shall issue an order requiring such person to comply with such * * * requirement, or he shall bring a civil action in accordance with subsection (b) of this section." 33 1319(a)(3).[11] Section 309(b) authorizes the Administrator "to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section." 33

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[11] Section 309(a)(1) provides that the Administrator may refer a violation of a state NPDES permit to the state for enforcement under its federally approved permitting program. 33 U.S.C. 1319(a)(1). If the state fails to take timely enforcement action, the Administrator may initiate an administrative or judicial enforcement action. *Ibid.* Section 309(a)(2) provides that if the state enforcement mechanisms are inadequate, the Administrator shall assume full enforcement responsibility within the state. 33 U.S.C. 1319(a)(2). Section 309(a)(3) specifically authorizes the Administrator to issue compliance orders, while Section 309(a)(4)-(6) set forth criteria for issuance of those orders. 33 U.S.C. 1319(a)(3)-(6).

U.S.C. 1319(b).[12] These two methods provide EPA with full authority to ensure that a party complies with NPDES permit requirements.

Section 309 also sets forth three methods for EPA to penalize noncompliance. Section 309(c) provides that any person who negligently or willfully violates an NPDES permit requirement shall be punished by a fine, imprisonment, or a combination of both sanctions. 33 U.S.C. 1319(c).[13] Section 309(d) provides, more generally, that any person who violates a permit requirement shall be subject to a judicially imposed civil penalty. 33 U.S.C. 1319(d).[14] And Section 309(g), added by Section 314 of the Water Quality Act of 1987 (see note 1, *supra*), provides that whenever the Administrator dis-

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[12] Section 309(b) provides that "[a]ny action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance." 33 U.S.C. 1319(b).

[13] Section 312 of the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 42, amended Section 309(c) of the Clean Water Act to expand significantly the reach of potential criminal liability and to increase the potential penalties. Under those amendments, a defendant who negligently violates a permit may be imprisoned for up to one year and may be fined up to $25,000 for each day the violation continues. 101 Stat. 42-43. These penalties are doubled in the case of a repeat offender. 101 Stat. 43. A defendant who knowingly violates a permit may be imprisoned for up to three years and fined up to $50,000 for each day the violation continues. *Ibid.* These penalties, again, are doubled in the case of a repeat offender. *Ibid.* Section 309(c), as amended, also imposes additional penalties for knowing endangerment of other persons, false statements, and tampering with monitoring devices. 101 Stat. 43-44.

[14] Section 313 of the Water Quality Act of 1987 amended Section 309(d) to increase the maximum civil penalty from $10,000 per day for each violation to $25,000 per day for each violation. 101 Stat. 45. It also amended Section 309(d) to specify certain factors—such as the seriousness, economic benefits and history of the violations—that are to be taken into account in assessing civil penalties. *Ibid.*

covers that a person has violated any permit condition or limitation, he may assess an administratively imposed civil penalty. 101 Stat. 46.[15]

Thus, the Clean Water Act grants EPA extraordinarily broad powers to compel compliance with NPDES permit requirements and to penalize noncompliance. The Act further provides that individual states that administer federally approved NPDES programs must have comparably broad enforcement authority.[16] Section 402(b)(1)(A) requires EPA to ensure that state programs exhibit adequate authority to issue permits that "apply, and insure compliance with" the Act's requirements (33 U.S.C. 1342(b)(1)(A)) and to "abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement" (33 U.S.C. 1342(b)(7)). EPA's regulations require, in turn, that state programs provide mechanisms to restrain violations through administrative and judicial action, and to impose criminal and civil penalties for violations. See 40 C.F.R. 123.27.[17]

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[15] Section 309(g) creates two classes of administrative civil penalties. Class I penalties, which respond to minor violations, are imposed through an informal administrative procedure and may not exceed $10,000 per violation or $25,000 in a single proceeding. 101 Stat. 46. Class II penalties, which respond to more serious violations, are imposed through a formal administrative adjudication and may not exceed $10,000 per day of violation or $125,000 in a single proceeding. *Ibid.*

[16] Indeed, Congress expected that the states would eventually assume the principal burdens of enforcing these permits. See, *e.g.*, H.R. Rep. 92-911, 92d Cong., 2d Sess. 115 (1972), *reprinted in* Senate Comm. on Environment and Public Works, 93d Cong., 1st Sess., 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 802 (Comm. Print 1973) [hereinafter *Leg. Hist.*].

[17] In the present instance, Virginia's NPDES permit program authorizes the State Water Control Board to issue orders requiring persons who have violated the terms and conditions of a certificate issued by the Board to comply with such terms and conditions

In short, Congress formulated detailed and comprehensive enforcement mechanisms that allow the federal and state governments to rectify present and past violations, tailoring their enforcement efforts in light of the willfulness, seriousness, and continuity of the permittee's noncompliance.

B. Section 505 Of The Clean Water Act Authorizes Private Citizens To Bring Civil Enforcement Actions Against A Person Who Is Alleged To Be In Violation Of NPDES Permit Requirements

Congress supplemented the Clean Water Act's broad governmental enforcement provisions through Section 505, which authorizes private citizens to bring civil enforcement actions in certain carefully defined situations. See 33 U.S.C. 1365.[18] Of particular relevance here, Congress determined that while the government may both enjoin permit violations and penalize purely past transgressions, citizen suits are directed toward ensuring present compliance. Section 505 accordingly provides that a citizen may commence a private enforcement action upon an allegation that a party is failing to comply with its NPDES permit.

(Va. Code Ann. § 62.1-44.15(8a)(iii) (Supp. 1986)). The Board may also bring a court action to enjoin ongoing violations (*id.* § 62.1-44.23 (1982)) and to seek imposition of civil penalties (*id.* § 62.1-44.32; *id.* § 62.1-44.15(8c) (Supp. 1986)).

[18] See *Middlesex County Sewerage Authority*, 453 U.S. at 14. Congress, recognizing that citizen suits should serve as an important but carefully circumscribed supplement to government enforcement efforts, placed a number of significant limitations on private enforcement actions. For example, a citizen contemplating a citizen suit must give pre-complaint notification to EPA, the state, and the alleged violater, and may not proceed with its suit if the government elects to commence its own compliance action. CWA § 505(b), 33 U.S.C. 1365(b). See note 5, *supra*. And the Water Quality Act of 1987 further provides that a citizen may not enter into a consent decree with the alleged violator without first giving the United States an opportunity to object to the proposed settlement. See § 504, 101 Stat. 75.

Section 505(a) states that "any citizen may commence a civil action on his own behalf * * * against any person * * * who is alleged to be in violation of * * * an effluent standard or limitation" (33 U.S.C. 1365(a)). The meaning of that provision is clear. Section 505 requires a citizen to allege, as an essential element of his private enforcement action, that the defendant is failing to comply on a continuous or intermittent basis with his permit requirements. That allegation, when made in good faith and well grounded in fact (Fed. R. Civ. P. 11), states a cause of action under Section 505 that falls within a federal district court's subject matter jurisdiction.[19] It thus subjects the defendant to the full power of the court "to enforce such an effluent standard or limitation * * * and to apply any appropriate civil penalties under section 1319(d) of this title." CWA § 505(a), 33 U.S.C. 1365(a).[20]

The plain language of the statute compels this construction.[21] Section 505(a) allows private enforcement

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[19] As this Court has observed, subject matter jurisdiction "is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case * * *." *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979). A citizen plaintiff must satisfy the conditions set forth in Section 505 to state a cause of action falling within the federal court's subject matter jurisdiction. To obtain relief, the citizen must also demonstrate, of course, that he possesses standing to bring the action and that he is entitled to an available remedy. See 442 U.S. at 239 n.18. See also notes 34, 35, *infra*.

[20] See *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986); *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985); see also *City of Evansville* v. *Kentucky Liquid Recycling*, 604 F.2d 1008, 1014 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980) (dicta).

[21] "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See *United States* v. *James*, No. 85-434 (July 2, 1986), slip op. 6-8; *United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

actions against persons "alleged to be in violation" (33 U.S.C. 1365(a)) of Clean Water Act effluent standards. By its express terms, Section 505(a) authorizes a citizen to bring a suit upon an *allegation* of *present* noncompliance. This language cannot be sensibly read, as the court below would have it (Pet. App. 17a), to authorize citizen suits based solely on an allegation of "permit violations committed *entirely in the past*" (*ibid.* (emphasis added)).[22] But neither can Section 505(a) be read, as Gwaltney would have it (Pet. Br. 11 & n.10, 38), to require a citizen to *prove* a present violation as a jurisdictional precondition to bringing a citizen suit.[23] The legis-

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[22] Congress's use of the present infinitive phrase "to be in violation" reasonably encompasses both continuous violations and intermittent violations that may recur on a regular, seasonal, or episodic basis. See *Pawtuxet Cove Marina, Inc.*, 807 F.2d at 1093 & n.3. See also, *e.g.*, 118 Cong. Rec. 33693 (1972) (1 *Leg. Hist.* [illegible]) (Sen. Muskie) ("Citizen suits can be brought to enforce against both continuous and intermittent violations."). Indeed, even Gwaltney concedes that Section 505(a) allows suits to abate ongoing violations, including actions against the "chronic episodic violator who fortuitiously avoids a permit exceedence on the day of suit" (Pet. Br. 16-17; see *id.* at 29 n.30). But Section 505(a)'s plain terms do not authorize citizen suits solely to collect civil penalties for wholly past violations that have no prospect of recurrence. See also CWA 505(g), 33 U.S.C. 1365(g) (defining "citizen" as a person "having an interest which *is or may be* adversely affected") (emphasis added). We believe that the court of appeals (and the district court decisions on which it relies (Pet. App. 10a-11a)) are plainly mistaken on this point.

[23] Section 505's use of the word "alleged" in conjunction with the phrase "to be in violation" indicates that for purposes of satisfying the statutory threshold, the question whether the citizen plaintiff has an actionable claim—and likewise whether the district court may hear that action—depends on the allegations contained in the complaint rather than the proof eventually adduced at trial. Gwaltney, at bottom, simply contends that the phrase "alleged to be in violation" should be treated as meaning "in violation" (see Pet. Br. 11 n.10, 37-43). "The short answer is that Congress did not write the statute that way." *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979). "It is a familiar principle of statutory con-

lative history provides no basis for deviating from Section 505(a)'s unambiguous language. The committee reports all discuss citizen suits in the context of seeking abatement of present violations.[24] Furthermore, the reports consistently adhere to the statutory formulation, requiring an allegation of present noncompliance.[25]

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struction that courts should give effect, if possible, to every word that Congress has used in a statute." *Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524, 530 n.15 (1985). *See, e.g., Lowe* v. *SEC*, 472 U.S. 181, 207 n.53 (1985); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). That principle has particular force here, where the legislative history suggests that Congress intentionally chose this language (see note 25, *infra*) and the language is fully consistent with Congress's expressed objectives (see pages 18-22, *infra*).

[24] See S. Conf. Rep. 92-1236, 92d Cong., 2d Sess. 145 (1972) (1 *Leg. Hist.* 328); H.R. Rep. 92-911, 92d Cong., 2d Sess. 132-134 (1972) (1 *Leg. Hist.* 819-821); *id.* at 407 (1 *Leg. Hist.* 876) (additional views of Rep. Abzug); S. Rep. 92-414, 92d Cong., 1st Sess. 79-82 (1971) (2 *Leg. Hist.* 1497-1500); see also 118 Cong. Rec. 33693 (1972) (1 *Leg. Hist.* 163) (Sen. Muskie); 118 Cong. Rec. 33717 (1972) (1 *Leg. Hist.* 221) (Sen. Bayh); 118 Cong. Rec. 10203 (1972) (1 *Leg. Hist.* 347) (Rep. Madden). As the court of appeals noted (Pet. App. 14a), Senator Muskie stated at one point that "a citizen has a right under section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be, *or to have been*, in violation, whether the violation be a continuous one, or an occasional or sporadic one." 118 Cong. Rec. 33700 (1972) (1 *Leg. Hist.* 179) (emphasis added). However, that statement, read in context, simply indicates that an allegation of a present intermittent violation will typically rest (as in the instant case) upon a past pattern of chronic violations. See *Pawtuxet Cove Marina, Inc.*, 807 F.2d at 1093 & n.3.

[25] See S. Conf. Rep. 92-1236, *supra*, at 145 (1 *Leg. Hist.* 328) ("Anyone may initiate a civil suit against any person who is *alleged to be in violation* of an effluent limitation * * *.") (emphasis added); H.R. Rep. 92-911, *supra*, at 133 (1 *Leg. Hist.* 820) ("Subsection (a) of section 505 authorizes a citizen to bring a civil action against any person * * * who is alleged to *be in violation* of effluent standards * * *.") (emphasis added); S. Rep. 92-414, *supra*, at 79 (2 *Leg. Hist.* 1497) (Section 505 "is carefully restricted to actions where violations of standards and regulations * * * *are alleged*.") (emphasis added).

The Clean Water Act's structure and objectives fully support interpreting Section 505(a) according to its plain terms.[26] Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (CWA § 101(a), 33 U.S.C. 1251(a)), and it gave EPA and the individual states broad power to achieve that goal through actions to ensure present compliance and to penalize past violations (see pages 10-14, *supra*). But Congress determined, not surprisingly, that private enforcement should be specifically directed toward persons "alleged to be in violation" of the Act's requirements. Congress supplemented government enforcement resources in precisely those cases, involving allegations of ongoing noncompliance, that present the most pressing need for prompt enforcement action.[27]

Furthermore, we believe that Congress's use of the phrase "alleged to be in violation" reflects a conscious sensitivity to the practical difficulties of detecting and proving chronic episodic violations of environmental standards.[28] As Congress recognized in the case of the

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[26] When interpreting a provision of a complex statute like the Clean Water Act a court may appropriately "look to the provisions of the whole law, and to its objects and policy." See, *e.g.*, *Pilot Life Insurance Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987), slip op. 10; *Kelly* v. *Robinson*, No. 85-1033 (Nov. 12, 1986), slip op. 6 (citations omitted).

[27] See *City of Evansville* v. *Kentucky Liquid Recycling*, 604 F.2d 1008, 1015 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980) ("Section 505 evidences a congressional intent to carefully channel public participation in the enforcement of the Act.") (footnote omitted). Plainly, enforcement actions brought simply to obtain civil penalties for nonrecurring past violations are of lesser urgency in achieving the Act's principal goal of immediate pollution abatement, though such penalties can have a significant deterrent effect and thus may play an important role in the government's overall enforcement strategy.

[28] This language originated in the citizen suit provisions of the Clean Air Act (§ 304, 42 U.S.C. 7604), which presents similar problems in detecting and proving chronic episodic violations. The

Clean Water Act, an enforcement action—whether brought by the EPA, the states, or private citizens—will usually be based upon the permit violations revealed in the permittee's own discharge monitoring reports.[29] But in most cases, those reports are not publicly available for several weeks (or longer, depending on the permit requirement) following the month in which the violations take place.[30] Thus, it is not generally possible for a citizen to know a company's precise compliance status on the day—or even the month—in which he files his complaint. Section 505(a)'s specification that a citizen may initiate a private enforcement action on the basis of an allegation —rather than proof—of present noncompliance allows the citizen to commence suit upon a reasonably based good-faith belief of ongoing noncompliance. The statutory scheme wisely postpones the question whether the defendant is in fact failing to comply with his permit requirements for adjudication on the merits.[31]

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language is repeated in other statutes authorizing citizen suits. See, *e.g.*, Resource Conservation and Recovery Act § 7002, 42 U.S.C. (& Supp. III) 6972; Toxic Substances Control Act § 20, 15 U.S.C. 2619.

[29] See, *e.g.*, S. Rep. 92-414, *supra*, at 62 (2 *Leg. Hist.* 1480); *id.* at 81 (2 *Leg. Hist.* 1499).

[30] For example, the discharger must analyze samples, make the necessary time-averaging calculations, prepare the reports, and submit them to EPA or the state enforcement agency. Citizens may also encounter additional delays in obtaining the reports from the appropriate governmental unit. See J.A. 82.

[31] Gwaltney's suggestion that a citizen plaintiff should base his complaint on a "current DMR" (Pet. Br. 19) misconceives the problem—"current DMRs" provide only *past* compliance information. For example, respondents filed their complaint on June 15, 1984, citing violations recounted in Gwaltney's most current publicly available discharge monitoring report—the March 1984 DMR. See Complaint Exhs. A & B. They promptly moved for partial summary judgment (which Gwaltney did not oppose) citing those violations as well as Gwaltney's long history of ongoing violations. See Motion for Judgment on the Pleadings (July 25, 1984). We understand that at the time the district court granted partial

In short, Section 505's plain language, legislative history, structure, and objectives, all support the conclusion that a citizen states a claim within the district court's jurisdiction by alleging that a NPDES permit holder is failing to comply with his permit. A complaint that fails to allege present noncompliance does not satisfy Section 505 and is subject to dismissal.[32]

There is no merit, we submit, either to the court of appeals' much more expansive interpretation of Section 505(a) or to Gwaltney's crabbed construction of that same provision. The court of appeals' conclusion that a citizen may bring an enforcement action simply to assess civil penalties for past nonrecurring violations rests on the mistaken premise that the citizen's private enforcement powers are coextensive with those of the government. See Pet. App. 9a-13a. But the government plainly has far broader enforcement powers (see pages 10-14, *supra*), including express authority—which Congress denied to private citizens—to seek civil penalties for wholly past permit violations.[33] Indeed, if Congress were to

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summary judgment, on August 30, 1984, Gwaltney's June 1984 DMR—the first report in nine months showing no violations—was not publicly available. Even if it had been available, that isolated DMR, when examined in the context of Gwaltney's five-year history of chronic noncompliance, offered no assurance that the company had ceased violating its permit.

[32] If the citizen fails to allege a present violation, his complaint is subject to dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. See, *e.g.*, 2A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 12.07[2.-5] (2d ed. 1986). Furthermore, a citizen's failure to allege a present violation also constitutes a jurisdictional defect that would justify dismissal under Fed. R. Civ. P. 12(b)(1). See note 19, *supra*; *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986); *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985); see also 2A J. Moore & J. Lucas, *supra* ¶ 12.07[2.-1].

[33] Section 309 authorizes the federal government to bring civil actions for injunctive relief (33 U.S.C. 1319(a)(3) and (b)) and—as a wholly separate matter—suits for civil penalties (33 U.S.C. 1319(d)). See pages 11-13, *supra*. The civil penalty remedy

grant private citizens enforcement powers coextensive with those of the government, serious constitutional questions would arise.[34]

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is "separably authorized in a separate and distinct statutory provision" (*Tull* v. *United States*, No. 85-1259 (Apr. 28, 1987), slip op. 12) that rests upon an independent cause of action (28 U.S.C. 2461) and grant of jurisdiction (28 U.S.C. 1345, 1355). Section 505, by contrast, contains a single mechanism for a citizen to seek an injunction and the imposition of civil penalties, limiting suits for those remedies to actions against a "person who is alleged to be in violation" of his permit. The marked divergence between the language of Section 309 and that of Section 505 persuasively demonstrates that Congress gave the government—but not private citizens—the power to seek civil penalties for wholly past violations.

[34] Article III of the Constitution requires that a plaintiff, at a minimum, "'"show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" • • • and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision" • • •."'" *Bender* v. *Williamsport Area School District*, No. 84-773 (Mar. 25, 1986), slip op. 7 (quoting *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted)). Article III therefore necessitates a "careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." See *Allen* v. *Wright*, 468 U.S. 737, 752 (1984). Section 505, if construed according to its plain terms, is consistent with Article III's threshold requirements. A citizen plaintiff who alleges that he is adversely affected by a company's ongoing violation of its discharge permit and requests an injunction requiring compliance can satisfactorily demonstrate, at least at the pleading stage, both personal injury and redressability. However, a citizen who brings suit simply to obtain a judicial assessment of civil penalties for nonrecurring past violations would fail to meet Article III's requirements; the mere assessment of civil penalties, which are payable only to the Treasury, would not redress in any meaningful sense the citizen's alleged injuries. Cf. *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973). Indeed, if Congress were to give private citizens untrammeled authority to seek penalties for wholly past violations—oblivious to Article III's requirement that a litigant have a personal stake in the controversy—it would intrude upon the Executive's respon-

Gwaltney's contention that a citizen must prove a present violation as a jurisdictional prerequisite to bringing a suit under the statute is likewise flawed. Gwaltney urges the Court to ignore Congress's use of the word "alleged" on the ground that the term, if given its ordinary meaning, would reduce Section 505(a) to a "mere rule of pleading, easily overcome simply by alleging a continuing violation" (Pet. Br. 38). But Section 505(a)'s requirement that a citizen premise his suit upon an allegation of present noncompliance imposes a *substantive* limitation on citizen enforcement authority. It defines the character of his cause of action and specifically precludes a citizen from initiating a suit solely for the purpose of penalizing past violations. See notes 32 & 34, *supra*.

Congress undoubtedly intended that citizen enforcement actions would be brought in conformity with the applicable pleading rules set forth in the Federal Rules of Civil Procedure. Thus, if a plaintiff's allegation of present noncompliance fails to comply with Rule 11—which specifically requires that the citizen's allegations be based on a good faith belief, formed after reasonable inquiry, that it is "well grounded in fact" (Fed. R. Civ. P. 11)—his suit is subject to dismissal. But his complaint should be dismissed, not simply as a sanction for violating Rule 11, but because Congress did not intend that Section 505(a)'s substantive prerequisite for a bringing a citizen suit—an allegation of present noncompliance—could be satisfied through bad-faith or unreasonably based contentions.[35]

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sibility to "take Care that the Laws be faithfully executed" (U.S. Const. Art. II, § 3) and the prosecutorial discretion inherent therein.

[35] The adequacy of the citizen plaintiff's allegations cannot be challenged through a motion to dismiss for failure to state a claim (Fed. R. Civ. P. 12(b)(6)) because that rule requires the court to assume, for purposes of the motion, that all of the allegations are true. See, *e.g.*, 2A J. Moore & J. Lucas, *supra* ¶ 12.07[2.5]. But the citizen's allegations can be tested through a motion to

C. Respondents Properly Alleged That Gwaltney Was In Violation Of Its NPDES Discharge Permit

We now turn to the application of Section 505's requirements to the instant case. Gwaltney portrays itself as a company, conscientiously striving to meet its NPDES permit requirements, that was wrongly sued after achieving full compliance through "state of the art" technology (Pet. Br. 3-7, 9, 19-21, 43-44). We believe that the record here and the district court's findings paint a markedly different picture. The record shows that Gwaltney continually showed disregard for its environmental compliance obligations, that it eventually upgraded its simple wastewater treatment facilities through rather rudimentary improvements but continued to violate its discharge permit, and that respondents therefore brought suit to enjoin Gwaltney's ongoing noncompliance. Respondents

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dismiss for lack of subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)), which permits the court to look behind the bare pleadings. See, *e.g.*, 2A J. Moore & J. Lucas, *supra*, ¶ 12.07[2.-1]. The threshold jurisdictional inquiry is limited, of course, to whether the citizen has satisfactorily *alleged* present noncompliance. CWA § 505(a), 33 U.S.C. 1365(a). The citizen need not prove the existence of a violation—a matter that may be impossible to prove at the preliminary stages of the litigation (see pages 18-19, *supra*). He need only show that his allegations satisfy the Rule 11 standards of good faith and reasonableness implicit in Section 505(a). Cf. *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 289 (1938).

Gwaltney's arguments concerning a plaintiff's obligation to prove jurisdictional facts (Pet. Br. 38-41)—even if they are correct—are simply inapposite in the present situation, where Congress has expressly premised the existence of a citizen cause of action and the court's resultant statutory jurisdiction on the citizen's *allegations*, rather than the facts he proves at trial. The citizen must, of course, prove those allegations to sustain his suit and obtain an injunctive remedy, but that presents an entirely distinct question. "A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the 'preconditions' for such equitable remedies." *Davis* v. *Passman*, 442 U.S. at 240 n.18.

properly stated a cause of action within the district court's jurisdiction and Gwaltney has failed to provide a persuasive reason why that jurisdiction should abate. The court of appeals' judgment should therefore be affirmed, despite that court's misunderstanding of the proper jurisdictional inquiry.

The record indicates that Gwaltney's compliance history prior to suit was, by any reasonable standard, abysmal. The facility violated its NPDES permit "on at least 237 occasions" between January 1979 and June 1984 (J.A. 58). Gwaltney conceded responsibility for more than 150 violations occurring after it purchased the facility in October 1981 (Pet. App. 87a). Gwaltney violated its permit 41 times in the three months immediately prior to respondents' February 29, 1984, letter informing the company of their intention to bring a citizen enforcement action (J.A. 116-117). And Gwaltney violated its permit on 13 additional occasions between the time Gwaltney received that notice and respondents filed suit (*ibid.*).[36]

The record further shows that respondents' June 15, 1984, complaint properly states a cause of action under Section 505. The complaint unambiguously alleged that Gwaltney was continually violating its permit.[37] Given

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[36] The district court later described Gwaltney's ongoing violations of the fecal coliform/chlorine standards as reflecting "an exceedingly unconcerned" attitude and "lackadaisical approach" that "border[ed] on benign neglect" (J.A. 108). It added that Gwaltney, by its own admission, "could have begun addressing the problems in its [TKN] biological treatment system substantially earlier" (J.A. 114).

[37] Gwaltney's suggestion to this Court (Pet. Br. 41 & n.54) that respondents' complaint alleged past and future—but not present—noncompliance is plainly without merit. Respondents' complaint alleged, inter alia, that Gwaltney "has violated the waste water discharge limits contained in its NPDES permit, as set forth in a letter to [Gwaltney] dated February 29, 1984"; that Gwaltney "*has continued to violate* its discharge permit since [respondents'] letter dated February 29, 1984"; and that respondents "believe and allege that, without the imposition of appropriate

Gwaltney's existing compliance record, there can be no serious dispute that respondents' allegations of continuing noncompliance were made in good faith and were well-grounded in fact at the time the complaint was filed. Gwaltney had repeatedly promised compliance (see, *e.g.*, J.A. 16, 29-30, 35-37, 51) but continued to violate its permit (see J.A. 116-117). Respondents were fully justified in concluding that nothing short of legal action would prompt Gwaltney to comply.[38]

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fines and issuance of an injunction, defendant Gwaltney * * * *will continue to violate* its NPDES permit." Pet. App. 82a-83a (emphasis added). Respondents specifically requested, among other relief, that the court "[d]eclare defendant Gwaltney of Smithfield, Ltd. to have violated and *to be in violation* of the Clean Water Act, 33 U.S.C. Sections 1311 and 1342" (Pet. App. 83a (emphasis added)). That complaint plainly met Section 505(a)'s threshold requirement that a citizen allege present noncompliance.

[38] Gwaltney now asserts, in hindsight, that respondents' allegations were unreasonable because it had ceased its fecal coliform/chlorine violations "aside from start-up exceedences" over 20 months prior to suit and because Gwaltney had installed a "new, state of the art treatment system" and, therefore, the company's "record of *past* TKN noncompliance was not at all indicative of present, ongoing violations" (Pet. Br. 41-42). This argument, had it been raised at the time the complaint was filed, would certainly have been rejected. First, a citizen plaintiff may allege ongoing permit noncompliance based on a defendant's continuing violation of different effluent parameters. See CWA § 505(f), 33 U.S.C. 1365(f) (defining "effluent standard or limitation" to include "a permit *or* condition thereof" (emphasis added)). Furthermore, Gwaltney's water treatment system is in no sense technically innovative; it involves a simple chlorination and lagoon retention process commonly used in small wastewater treatment plants. See J.A. 18-27. Gwaltney's long overdue improvements to its system were quite rudimentary (see *ibid.*; Pet. App. 90a-93a). Moreover, Gwaltney repeatedly represented that it would achieve full compliance within forty-five days after modifying the system (J.A. 38, 39). Gwaltney completed its modifications on October 18, 1983, but continued to violate the fecal coliform parameter in December 1983 and February 1984 (J.A. 116). And Gwaltney violated its TKN parameter in *every* month from October 1983 to May 1984. Thus—

Indeed, Gwaltney made virtually no effort to deny respondents' allegations in its July 5, 1984 answer to the complaint. Gwaltney merely stated, as an *affirmative defense*, that "the defendant has taken every reasonable means to correct and prevent further violations of its NPDES permit and there should be no further violations of same in the future" (Answer 3 (July 5, 1984)).[39] Gwaltney did move to dismiss the action, but only on the ground that "the cause of action is not matured under the Clean Water Act as the State Water Control Board of Virginia is bringing suit in the State Courts of the Commonwealth of Virginia to insure compliance by the defendant with the requirements of its NPDES permit" (*ibid.*). Thus, Gwaltney sought dismissal solely on the basis that the Virginia State Water Control Board would bring its own enforcement action "to insure compliance" and that respondents brought their suit too soon rather than too late.

If there were any doubt whether the respondents had stated a proper cause of action, it was resolved through the district court's ruling on the merits. After filing their complaint, respondents promptly moved for partial summary judgment. See Motion for Judgment on the Pleadings (July 25, 1984). They supported their motion with an affidavit stating that Gwaltney's "permit violations are ongoing; more violations have appeared each

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as the district court later found (J.A. 83 n.8)—Gwaltney could not credibly contend that it had achieved compliance at the time respondents filed their complaint. Even if some of Gwaltney's discharges may have been "largely uncontrollable" and therefore did not warrant enhanced civil penalties (see Pet. Br. 20; J.A. 115), they were nevertheless violations indicating noncompliance. See *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 92 (1975).

[39] Gwaltney later conceded that its answer did not admit or deny respondents' averments and that the district court's subsequent order granting partial summary judgment "rendered moot" the filing of such a responsive pleading. See Defendant's Memorandum in Support of Motion for Rehearing 3, 14 (Oct. 16, 1984).

time [respondents] have updated their research." Affidavit of Jeter M. Watson Supporting Plaintiffs' Motion for Summary Judgment 4 (June 29, 1984). Gwaltney did not dispute that affidavit; indeed, it filed no response at all to respondents' motion. The district court entered partial summary judgment on August 30, 1984, finding Gwaltney "to have violated and to be in violation" of the Clean Water Act (J.A. 59). Thus, the court determined, based on respondents' uncontested allegations, that Gwaltney was presently "in violation of its permit requirements."[40]

In these circumstances, there can be no serious doubt that respondents properly stated a cause of action under Section 505 that fell within the district court's subject matter jurisdiction. Thus, the only remaining question is whether Gwaltney's subsequent claims of compliance should divest the court of jurisdiction. The answer is controlled by familiar and generally applicable mootness principles governing injunctive actions.

This Court has long recognized that "as a general rule, 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot.'" *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979) (quoting *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).[41] But jurisdiction, properly acquired, may abate

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[40] The record suggests that even if Gwaltney had contested the motion for summary judgment, its efforts would have been unavailing. At the time the court ruled on the motion for summary judgment, seven of the company's last nine discharge monitoring reports showed violations. See J.A. 116-117. The two reports showing no violations, the June 1984 and the July 1984 DMRs (which apparently were not publicly available, see note 31, *supra*), monitored Gwaltney's effluent during the summer months, when TKN violations were unlikely to occur. Thus, they gave no assurance that Gwaltney could remain in compliance through the winter months. See J.A. 83 n. 8.

[41] "Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal con-

"if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated'" (*id.* at 633 (citation omitted)). The defendant's burden "'is a heavy one.'" *Davis*, 440 U.S. at 631 (quoting *W.T. Grant Co.*, 345 U.S. at 633).[42] These principles—which, like the requirement of standing, embrace core Article III concerns—are fully applicable to Clean Water Act citizen suits, which must be predicated upon an allegation of present noncompliance. See notes 32, 35, *supra*.

We can envision situations where a defendant might establish that its cessation of permit violations renders a citizen suit, properly initiated upon an allegation of ongoing violation, nonjusticiable. But the instant case does not fall within that description. The district court determined on August 30, 1984—ten weeks after the complaint was filed—that Gwaltney was "in violation" of the Clean Water Act. Gwaltney did not raise its belated claim of present compliance until May 16, 1985, six months after the district court's trial on an appropriate remedy and nearly one year after the complaint was

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duct." *W.T. Grant Co.*, 345 U.S. at 633. These principles apply even when the cessation occurs prior to the filing of the complaint. See, *e.g.*, *United States* v. *Parke Davis & Co.*, 362 U.S. 29, 48 (1960). "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption." *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952).

[42] This Court has refused to dismiss on mootness grounds where, for example, "it is not 'absolutely clear,' absent the injunction, 'that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Vitek* v. *Jones*, 445 U.S. 480, 487 (1980) (quoting *United States* v. *Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). But even if a court refuses to dismiss on jurisdictional grounds, it may still deny relief on the merits, on legal, factual or equitable grounds. *Id.* at 203-204. See, *e.g.*, *Amoco Production Co.* v. *Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 9; *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982).

filed.[43] The district court found that Gwaltney's own witness had expressed doubt at trial whether the company could remain in compliance through the upcoming winter (J.A. 83 n.8, 111). The court ultimately concluded that "Gwaltney appears to have achieved compliance" (J.A. 111 n.25), noting that a contrary conclusion "would be too speculative given the present record" (J.A. 112 n.26). But the court clearly was unconvinced that there was no reasonable prospect of future noncompliance; it mandatorily enjoined Gwaltney to provide respondents with "all reports [Gwaltney] submits to state or federal government[s] relating to its NPDES permit" including monthly discharge monitoring reports detailing Gwaltney's compliance status (J.A. 119).

Thus, the record and the district court's determinations indicate that Gwaltney failed to show that " 'there is no reasonable expectation that the wrong will be repeated' " (*W.T. Grant Co.*, 345 U.S. at 633). The district court therefore had jurisdiction to enter an appropriate remedy. The question whether the court abused its discretion in formulating its remedy (Pet. Br. 42-43)—like questions surrounding citizen settlement practices (Pet. Br. 30-32)—is not, of course, before this Court.

In sum, we submit that the courts below reached the correct result in holding that Gwaltney was not entitled to a dismissal of respondents' suit under Fed. R. Civ. P. 12(b)(1). Respondents properly alleged Gwaltney

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[43] Gwaltney now places great reliance on a December 17, 1984, joint pretrial stipulation filed by Gwaltney and respondents, claiming that it represents a concession that Gwaltney was in present compliance with its permit requirements (Pet. Br. 7). However, that stipulation simply states that ["Gwaltney's] DMR's [Exhibit 10] do not reflect any permit violations on any occasion subsequent to May 15, 1984" (Pet. App. 86a). Respondents did not concede that Gwaltney had ceased continuing to violate its permit; they simply stipulated to the contents of Gwaltney's discharge monitoring reports (which, even at that time, were available only up to August 1984) for the purpose of determining an appropriate civil penalty.

"to be in violation" of its NPDES permit and the record findings reveal no reason under traditional principles governing injunctive actions why the district court should have been divested of jurisdiction. That should be the end of the jurisdictional inquiry.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Petitioner,

v.

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NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE ROLLINS ENVIRONMENTAL SERVICES (NJ) INC.

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BRIEF OF AMICUS CURIAE ROLLINS ENVIRONMENTAL SERVICES (NJ) INC.

INTERESTS OF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court,[1] the *Amicus Curiae*, Rollins Environmental Services (NJ) Inc., files this brief in support of petitioner, Gwaltney of Smithfield, Ltd. *Amicus Curiae* adopts and supports petitioner's argument for reversal of the decision below on grounds that private prosecutions under the Clean Water Act may not be brought to seek civil penalties for purely past violations, as the Fifth Circuit held in *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985). This brief is submitted to supplement that argument by bringing to the Court's

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

attention serious questions about the constitutionality of the statutory authority at issue. Since acceptance of petitioner's argument would obviate the need to address those questions in this case,[2] *Amicus Curiae* does not request that the Court rule on them at this time. It merely wishes to urge that the Court not preclude a full consideration of the authority's constitutionality in deciding the statutory construction question that is presented.[3]

Rollins Environmental Services (NJ) Inc. ("Rollins"), the owner and operator of a commercial hazardous waste treatment facility in Bridgeport, New Jersey, is a defendant in *NJPIRG v. Rollins Environmental Services (NJ) Inc.*, Civil Action No. 86-3438. *NJPIRG* is a private prosecution now pending before the District Court for the District of New Jersey in which civil penalties are sought under the same section of the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* (the "Clean Water Act" or the "Act") as the one this Court is asked

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[2] Respondents sought in this case the recovery of penalties for purely past violations. Thus, a decision of this Court to find such violations not punishable under the private prosecution authority would moot the constitutional questions raised. However, despite such a ruling, in other factual circumstances where the Clean Water Act problems at issue had not already been completely resolved, the private prosecution authority would be available for citizen-initiation of actions for civil penalties, and the constitutional infirmities would be equally evident and serious. A decision in this case that purely past violations are not within the scope of the authority would thus simply postpone the day that such infirmities need be addressed.

[3] In urging the Court's cognizance of our views, we would note Mr. Justice Jackson's observation that "sometimes the path that we are beating out by our travel is more important to the future wayfarer than the place we choose to lodge." *First National Bank v. United Airlines*, 342 U.S. 396, 398 (1952) (concurring opinion). Drawing upon this metaphor, we in part urge the contrary: namely, that the place the Court here "chooses to lodge" is indeed quite important. However, we at the same time respectfully urge that the Court's decision do nothing to impede those on different journeys in traveling "the path that we are beating out" in this brief.

to construe in this case (§ 505). Plaintiffs in that action, Public Interest Research Group of New Jersey, Inc. ("NJPIRG") and Friends of the Earth, have filed notice that they will move jointly in *NJPIRG* for partial summary judgment. In their complaint, plaintiffs seek, among other relief, civil penalties for past violations as respondents did in this case. Thus, the decision of this Court will ineluctably be a major factor in determining the extent to which *Amicus Curiae* may be liable in *NJPIRG* for civil penalties.

Rollins in *NJPIRG* has challenged the constitutionality of the Clean Water Act's private prosecution authority under which massive civil penalties may be imposed—the authority also at issue here—as a violation of the Constitution's separation of powers. Accordingly, Rollins respectfully submits that crucial to the Court's informed review of the issues raised in this case is the presentation of the analysis upon which its constitutional challenge is based.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents' prosecution of petitioner under the Clean Water Act resulted in the imposition of civil penalties of some $1.3 million under the Act's private prosecution authority. As interpreted by the courts below, that authority is identical in all substantive respects to that which the Act also delegates to the Executive Branch. Congress' establishment of such an independent private scheme for prosecuting alleged violators of federal law conflicts with the Constitution's grant of powers to the Executive. Under Article II, the prosecution of civil actions to enforce federal law and the exercise of prosecutorial discretion with respect to the pursuit of such actions are within the exclusive purview of the Executive Branch. Since Congress can assign such executive functions only to Presidential appointees, the Act's authorizing of private citizens to prosecute for civil penalties violates the separation of powers mandate of the Constitution.

Prior to enactment of this far-reaching authority in 1972, Congress had apparently never previously authorized such private prosecution in any other statute.[4] Although it was little used for about a decade, this authority increasingly has been invoked around the country in recent years—so much so that by 1983 private citizens initiated more prosecutions under the Clean Water Act than did federal enforcement officials.

The constitutional prerogatives that this private prosecutorial authority conflicts with are the Executive's duty to "take Care that the Laws be faithfully executed," and the concomitant privilege—also provided for under Article II—to appoint officers to execute federal law. Enforcement of federal laws for protection of the public interest is among the most basic of the functions the Constitution bestows upon the Executive. Equally indisputable is the corollary principle apposite to this challenge—namely, that prosecution for civil penalties payable to the federal Treasury is a central part of the Executive's civil enforcement jurisdiction. Indeed, lawsuits seeking civil penalties have been a favored avenue of the federal government for prosecuting violations of the wide range of congressionally-mandated regulatory requirements.

Congress unquestionably has a substantial role in regulating the execution of federal law, but the Constitution carefully circumscribes that role in major respects—as becomes apparent upon reviewing pertinent separation of powers decisions of this Court. Among Congress' powers are the right to establish whatever limitations on execution it deems appropriate and are otherwise constitutional; it also may hold oversight hearings with respect

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[4] The *qui tam* authority provided for in a few statutes—which has been suggested as a possible precedent—is not analogous to the private prosecution authority in the Clean Water Act and subsequent environmental statutes. *See* p. 29, n.23, *infra*.

to the administration and enforcement of federal law; it may even authorize private individuals to bring actions to seek damages or injunctive relief that may incidentally, and possibly significantly, benefit the public interest.

What Congress cannot do is delegate the "execution of federal law"—such as enforcement of federal statutes on behalf of the broader public interest—to persons other than Officers of the United States appointed by the President. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). *Buckley* leaves no doubt that this is an inviolable separation of powers principle. *Id.* Furthermore, in the wake of *Bowsher v. Synar*, —— U.S. ——, 106 S.Ct. 3181 (1986), even where the President initially appoints an official authorized to execute federal law, Congress cannot control the removal of the official. Thus, in determining who is to be responsible for the execution of laws on behalf of the public, Congress is limited to deciding *which executive officials* are to perform such functions.

The Constitution's establishment of this fundamental precept is not just an exercise in formalism, as is well demonstrated in the context at issue. In establishing clean water restrictions, the federal Environmental Protection Agency ("EPA") has set limits at levels that are not expected to be met 100% of the time. *See e.g. FMC Corp. v. Train*, 539 F.2d 973, 985-86 (4th Cir. 1976); *American Petroleum Institute v. EPA*, 661 F.2d 340, 351 (5th Cir. 1981). Congress, though, has authorized identical civil penalty requirements in the Clean Water Act for all violations—without regard to magnitude or consistency with initial permit assumptions. Thus, substantial executive discretion is of necessity implicitly sanctioned, both in deciding whether to bring lawsuits and in determining amounts of penalties sought. The government's exercise of this broad discretion has been accomplished, in part, through EPA's use of an elaborate enforcement policy that takes into account a vast array of factors.

In contrast to this measured approach to enforcement, respondents and other private groups routinely decide to bring lawsuits simply because a report submitted by an industrial facility to EPA or a state agency shows required permit limits to have been exceeded, even though further investigation might show that the violations at issue may have been contemplated at the time the limit was established, or that no enforcement action might be appropriate under the federal enforcement policy. The presence of these mitigating circumstances notwithstanding, the interpretation given by the courts below to the private prosecution authority, which has the effect of sanctioning prosecution of *any* violations for civil penalties, allows respondents and others to obtain settlements providing for sizable payments to private groups they choose to designate—even though private damages or other private payments clearly are not authorized, only civil penalties payable to the federal Treasury.

Regardless of whether or not private citizens carry out their prosecutorial role under the Act in a reasonable manner, though, their intervention will in every event act to displace the Executive's exercise of prosecutorial discretion, which has long been recognized as an integral part of its power to enforce the law. Given the broad range of factors that must be taken into account in deciding whether and how to proceed in addressing apparent Clean Water Act violations, the constitutional guarantee that such discretion must reside only with the Executive merely confirms the soundness of the Constitution's framework.

Buckley v. Valeo, the seminal ruling of the Court that is relevant here, appears moreover to stand as a clear precedent in support of the conclusion that the Act's private prosecution authority to seek civil penalties should be found unconstitutional. There, the Court held that, under the Appointments Clause, similar civil enforcement authority under the federal elections law could only be carried out by persons appointed by the President.

ARGUMENT

THE AUTHORIZATION OF PRIVATE PROSECUTION FOR CIVIL PENALTIES UNDER THE CLEAN WATER ACT VIOLATES THE CONSTITUTION'S SEPARATION OF POWERS.

A. The Authority To Prosecute For Civil Penalties That The Clean Water Act Grants To Private Citizens Is A Function The Constitution Assigns Exclusively To The Executive.

Article II of the Constitution vests the President with the power and duty to "take Care that the Laws be faithfully executed. . . ." Art. II, § 3.[5] Each Branch is to "exercise one of the governmental powers recognized by the Framers as inherently distinct." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982); *see also J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). As Mr. Chief Justice Burger stated in his dissenting opinion in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the separation of powers is "in no sense a formalism. It is the characteristic that distinguished our Constitution."[6] *Id.* at 506.

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[5] The Executive's responsibilities were separated from those of the Legislature based upon the philosophy that "[w]hen the Legislative and Executive powers are united in the same person or body, . . . there can be no liberty, because apprehensions may arise lest *the same* Monarch or Senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." The Federalist No. 47 (J. Madison) (Cook ed.) (emphasis in original). The Framers also had "the profound conviction . . . that the powers conferred on Congress were the powers to be most carefully circumscribed." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 947 (1982). Accordingly, the Constitution makes the Executive "separate and wholly independent" from the Legislative Branch. *Bowsher v. Synar*, 106 S.Ct. 3181, 3186 (1986).

[6] The court in *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986) (three judge panel), *aff'd sub. nom. Bowsher v. Synar*, —— U.S. ——, 106 S.Ct. 3181 (1986), recently discussed the Framers' approach to limiting government through the separation of powers:

> Mid-twentieth century Americans have become accustomed to assuming that the central constitutional method of protecting

1. *Civil Enforcement Of Federal Law Is The Quintessential Executive Function.*

Of the functions the Constitution delegates to the Executive, none is more fundamental than the duty to enforce federal laws such as the Clean Water Act so as to protect the public interest. *See, e.g., Myers v. United States*, 272 U.S. 52, 117 (1926). Moreover, as this Court stated in *Buckley v. Valeo*, "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts" the carrying out of that responsibility. 424 U.S. at 138.

The Court made a similarly definitive statement more than a century before:

> [I]t is clear that all [civil litigation] so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney-General.

Confiscation Cases, 74 U.S. 454, 458-459 (1869). The Court later was equally unequivocal in *Springer v. Philippine Islands* in stating that "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions." 277 U.S. 189, 202 (1928).

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individual freedoms from being overridden by government ukase is to prevent governmental intrusions into certain defined zones of individual conduct. Thus, we quite rightly applaud actions enshrining constitutional rights to freedom of speech, religion, privacy, and equal protection.

Those who wrote the Constitution, however, did not employ this technique. Rather, they emphasized the virtues of limiting governmental power and then dividing the remaining power among autonomous government compartments. Hence, most of our constitutional rights of individual liberty or autonomy are stated in constitutional amendments. The body of the Constitution as originally written is principally an exercise in applying the concepts of federalism and separation of powers.

Id. at 1403-1404, *quoting* Krattenmaker, "Article III and Judicial Independence, Why the New Bankruptcy Courts are Unconstitutional," 70 Geo. L.J. 297, 301-302 (1981).

2. *Private Prosecutions For Civil Penalties Under The Clean Water Act Constitute Civil Enforcement Of Federal Law.*

The private civil prosecution authority under the Clean Water Act, as interpreted by the courts below, is coextensive in every detail with that of the federal government—with the single proviso that if the government itself has already initiated civil or criminal action, private prosecution cannot additionally be pursued. In fact, private citizens stand squarely in the federal government's shoes in prosecuting these punitive actions,[7] with the full panoply of civil enforcement powers available to be exercised. *See Sierra Club v. Aluminum Co. of America*, 585 F. Supp. 842, 853 (N.D.N.Y. 1984); *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 449 (D.Md. 1985) (citizens "seek the enforcement of federal law"). Wielding the government's broad discretion is allowed, moreover, in whatever way the private prosecutor deems appropriate.

The breadth of the Act's authorization for private citizens to bring civil punitive actions could hardly be greater. Prosecution is authorized for *any alleged viola-*

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[7] Prosecutions that seek the imposition of penalties are recognized to be punitive, and for the benefit of the public as a whole. Additionally, they are clearly distinguishable from actions that are remedial in nature. In *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224 (1892), this Court stated:

> In the municipal law of England and America, the words "penal" and "penalty" have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. . . .
>
> Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. . . .
>
> The test whether the law is penal in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. . . .

13 S.Ct. at 227-228 (citations omitted).

tion of the major federal water pollution clean-up requirements. Civil penalties up to $25,000.00 per day per violation—the same penalties authorized in prosecutions by the federal government—can be sought in federal district court by anyone meeting a minimal standing requirement.

Furthermore, private prosecutions for civil penalties under the Clean Water Act are intended to punish violators in the same way as governmental prosecution. Protection of private rights is not their purpose at all. Indeed, as this Court has confirmed, Congress specifically rejected the establishment of a private right for damages. *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1, 21-22 (1981).

Congressional intent not to authorize the traditional "private attorney general' action under the Clean Water Act is thus unambiguous. Moreover, a review of federal statutes providing for that form of action, such as the antitrust statutes, highlights the existence of major differences between grants of such authority and the private prosecution authority challenged here. For example, section 4 of the Clayton Act authorizes "[a]ny person injured in his business or property . . . to recover damages." 15 U.S.C. § 15. Enforcement on behalf of the public interest (as opposed to such private remedial actions) is, by contrast, vested in federal agencies.[8]

Though the private remedy the antitrust laws authorize (which includes authority for an award of treble damages) additionally serves a public purpose in deterring antitrust violations, the relief clearly has the primary objective of remedying private injury. *See generally*, L. Sullivan, *Handbook of the Law of Antitrust* 769-774, 785 (1977); P. Areeda & D. Turner, 2 *Antitrust Law* § 331 (1978). Private prosecutions for civil

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[8] *See, e.g.*, 15 U.S.C. § 41, *et seq.* (Federal Trade Commission Act); 15 U.S.C. § 13 (Clayton Act § 2, authorizing Federal Trade Commission prosecution of actions for price discrimination); and 15 U.S.C. § 21 (Sherman Act § 4, delegating enforcement to various agencies).

penalties to enforce the Clean Water Act, on the other hand, seek the imposition of punitive measures to vindicate wrongs against the public. Thus, they are only superficially analogous to, and easily distinguishable from, private attorney general actions authorized under other laws.

3. *Displacement Of The Executive's Prosecutorial Discretion In And Of Itself Constitutes An Impermissible Infringement On Its Authority To Enforce Federal Laws.*

The Executive's exercise of prosecutorial discretion in determining whether and how to proceed is a major element of its authority to enforce federal law. By authorizing private citizens to supplant federal enforcers in making complex civil penalty prosecution decisions, the Clean Water Act thus not only permits significant encroachment upon the Executive's authority to initiate lawsuits, it also seriously undermines the concomitant prerogative of law enforcement—prosecutorial discretion.

That such discretion is entrusted to the Executive and generally not even reviewable by the courts is clear. "[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965) (as "an incident of separation of powers," courts are not to interfere with prosecutorial discretion). And this key component of executive authority is authorized in enforcement of all laws, not merely criminal statutes. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

As the Court stated in *Heckler v. Chaney* in a factual context that involved civil enforcement of a federal statute,

> This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal

> process, is a decision generally committed to an agency's absolute discretion. (Citations omitted.)
>
> . . .
>
> [W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the executive who is charged by the Constitution to "take care that the Laws be faithfully executed." U.S. Const., Art. II, § 3.

Id. at 831-832. The Court there elaborated further on this "presumption of unreviewability of decisions not to enforce," indicating that the presumption could be overcome if Congress expressly gave courts the authority to intervene or it otherwise acted to regulate agency action. However, nowhere is there any suggestion that granting private citizens the unfettered, standardless right to override the Executive's exercise of prosecutorial discretion would be permissible. *Id.*

The Court also pointed in *Buckley v. Valeo* to "[t]he Commission's enforcement power, *exemplified by its discretionary power to seek judicial relief*," 424 U.S. at 138 (emphasis added), as an important executive function exclusively assigned "to the President." Similarly, in holding that prosecutorial discretion resides solely with the Executive, the D.C. Circuit Court of Appeals recently stated, "[i]f the execution of the laws is lodged by the Constitution in the President, that execution may not be divided up into segments. . . . It is all the law enforcement authority and it all belongs to the Executive." *Nathan v. Smith*, 737 F.2d 1069, 1079 (D.C. Cir. 1984). The D.C. Circuit further pointed out that Congress' undertaking "to control the law enforcement power of the President" by giving "courts authority to issue appropriate orders . . . at the behest of private persons" would, "[o]n the face of the Constitution, . . . be a highly dubious attempt." *Id.* at 1078.

4. *Private Prosecutions Under The Act Have The Effect Of Overriding The Executive's Exercise Of Prosecutorial Discretion.*

The need to exercise prosecutorial discretion in deciding whether and how to respond to any violation is endemic in view of the way that Clean Water Act permits are developed and the range of enforcement alternatives that are available. Since, as noted *supra*, permit limitations are not expected to be achievable at all times, both EPA and the federal courts have recognized that the exercise of enforcement discretion is an inherently necessary element of the regulatory program under the Act. *See Weyerhaeuser Company v. Costle*, 590 F.2d 1011, 1057 (D.C. Cir. 1978); *CPC International, Inc. v. Train*, 540 F.2d 1329, 1338 (8th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *see also FMC Corporation v. Train*, 539 F.2d 973, 986 (4th Cir. 1976) (holding that EPA must provide protection against liability where permit exceedances may result from exceptional incidents beyond the reasonable control of a permittee); *American Petroleum Institute v. EPA*, 661 F.2d 340, 350-52 (5th Cir. 1981); *Marathon Oil Company v. EPA*, 564 F.2d 1253, 1272-1273 (9th Cir. 1977). EPA's assertion of its authority to exercise enforcement discretion also is consistent with prosecutorial discretion having been found to be within the authority of other Officers of the United States. *See Heckler v. Chaney*, 470 U.S. at 831-832.

Enforcement decisions in response to violations of Clean Water Act permit restrictions involve the exercise of prosecutorial discretion in at least four different contexts. First, the Agency must determine whether the violation warrants any response at all. Second, it must determine what type of response is warranted. Third, if the Agency decides to initiate prosecution and pursue penalties, it must determine the magnitude of penalties that should be sought. And fourth, if prosecution is brought, the government must make all the decisions requisite to prosecuting and concluding such actions.

To assist it in exercising the requisite discretion, the Agency has developed a definition of significant noncompliance which considers the number and magnitude of violations in determining whether any enforcement response at all is appropriate. In those situations where EPA decides a response is warranted, the Agency must then proceed to consider what type of response is appropriate. Such enforcement may be either informal or formal. If formal enforcement is to be pursued, EPA has three mechanisms from which it can choose. It may issue an administrative order requiring the discharger to take certain action to come into compliance within a specified time period; it may pursue, under recently enacted amendments to the Act, administrative civil penalties for violations; or it may prosecute the violations in federal court.

Determining the appropriate course to follow thus involves the exercise of significant prosecutorial discretion, with EPA required to make case-by-case evaluations taking into account a variety of highly subjective considerations. EPA's clear decision to give enforcement priority to taking steps to bring facilities into compliance, rather than pursuing civil penalties, is evident from statistics that compare the number of administrative orders issued to the number of referrals to the Department of Justice for civil prosecution. In 1983, for instance, EPA made 56 such referrals under the Clean Water Act, while it issued 781 administrative orders.

For those limited cases where EPA decides to prosecute alleged violations, the Agency must decide what amount of penalties should be sought. Although the statute provides for potentially massive penalties (up to $25,000 per day per violation now, after being increased from $10,000 per day earlier this year by Congress), EPA has developed a complex penalty policy to estimate appropriate penalties for varying circumstances. Under this policy, the Agency evaluates both the gravity of the violation and the economic benefit that the discharger

has received by failing to meet the terms of its permit. Depending upon the facts at issue, this element of enforcement discretion can lead to EPA's making significantly different penalty demands.

Finally, once prosecutions are initiated, decisions must be made at every step regarding whether prosecution continues to be justified, how it should be pursued, and whether settlement alternatives are appropriate to protect the public interest. Thus, continually making difficult judgments and exercising broad prosecutorial discretion are inherent in such prosecutions.

The process that EPA utilizes is in stark contrast to the one private groups employ in their Clean Water Act prosecutions. The citizens' groups start at the same point as EPA and state agencies, by reviewing discharge monitoring reports ("DMR's")—reports that EPA requires industrial facilities to submit—to determine whether there are any violations. However, subsequent to that point, the groups' responses vary dramatically from those of regulatory agencies. Often, the groups have no knowledge of the facility, its history, the basis for the permit limits, the attempts the facility has made to achieve compliance, or the gravity of the harm that may have been caused by the violations. Thus, they cannot and do not exercise informed prosecutorial discretion in determining whether violations are significant and whether they require further action.

It also seems clear that their motivations for bringing such actions are in many cases not the same as those of EPA or state agencies.[9] While governmental prosecutions

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[9] To understand additionally why private prosecutions are so different from federal or state enforcement actions, one must further review the actual process utilized by plaintiffs and their attorneys in specific actions. Typically, these cases do not grow out of individual citizens' concerns that a facility in their vicinity may be affecting them and interfering with their enjoyment of the nearby waters. Instead, in recent years they have resulted primarily from a well-orchestrated effort on the part of a small number of law firms and

have focused, as noted above, primarily on achieving compliance, private prosecutions have been directed more at obtaining monetary penalties. Numerous such lawsuits have been brought in situations where facilities are no longer violating their permits; where they have ceased to operate altogether; or where facilities are no longer operating under permits because they have become connected to municipal treatment systems.

In seeking penalties, private prosecutors thus obviously are motivated differently than governmental agencies. Yet, in contrast with private attorney generals, they cannot properly be motivated by self-interest. However, the record of private prosecutors making settlements conditional on payments being made to private groups,[10] rather than the federal Treasury, shows the conflicts that in fact have arisen in private prosecutions. Indeed, a significant level of conflict is inherent by virtue of the

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national environmental groups to investigate DMRs in EPA and state files and to identify major dischargers with significant numbers of purported violations. This investigation is often undertaken by the attorneys under a general retainer agreement. Once the attorneys complete their very narrow investigation, they then recommend those dischargers against whom they feel prosecutions should be brought. The recommendations are submitted to the plaintiff organizations which basically rubber stamp them and authorize their attorneys to proceed. The lawyers then serve the 60-day notice required by the Act and proceed to file a complaint if an "adequate" settlement offer is not made by the potential defendant. The lawyers, if *NJPIRG, supra*, is representative, pursue settlement discussions without any involvement of their clients.

[10] The retainer agreement for example, between plaintiffs in *NJPIRG, supra*, and their attorneys contemplated that settlement amounts would be paid to private groups rather than to the federal Treasury, as the law requires. Consistent with this intent, a survey of 13 settlements in private prosecutions brought in 1983 shows virtually all to have been settled through payments being made to various private groups. In the sample reviewed, the settlement amounts paid to such groups totalled in excess of $500,000. Private prosecutions typically seek civil penalties at the outset, but settlements later reached provide for payment to private groups.

private lawyers' desire to achieve settlements that, at a minimum, provide for payment of their attorneys' fees.[11]

The unfairness resulting from enforcement of the Act's requirements without the Executive's control, and/or despite the intentional exercise of prosecutorial discretion, is far from an academic issue. In *NJPIRG*, *supra*, for example, both EPA and New Jersey reviewed various problems Rollins experienced in meeting its permit limitations. Both authorities then exercised their discretion not to take judicial enforcement action despite extensive knowledge about the problems. The authorities' considered judgment notwithstanding, private citizens are still permitted under the Act to intervene and override the experts' opinion.

In sum, the Clean Water Act slices off from the Executive a discretion-laden portion of its responsibility enforcing key federal requirements—authority of a kind apparently never previously granted in any other statute.[12] By so doing, Congress acted in clear contravention of the Constitution's exclusive vesting in the Executive of the power to vindicate public rights by filing lawsuits, *Confiscation Cases*, 74 U.S. at 458-459.[13]

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[11] Settlements reached in the private prosecutions described in n.10 *supra*, provided for payment of attorneys' fees that were almost four times the amount of penalties payable to the federal Treasury.

[12] Earlier grants of authority to private citizens in environmental statutes had merely authorized the bringing of suits for injunctive relief. *See e.g.*, Clean Air Act, 42 U.S.C. § 7604(a). More recently, though, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, 6925, and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, [206] (as amended), have incorporated private prosecution provisions similar to that of the Clean Water Act.

[13] In fact, the appointment of unnamed private citizens to exercise executive enforcement authority raises a significant set of constitutional concerns in addition to those posed in prior cases by Congress' vesting of executive authority in its own officers, because citizen prosecutors are not under the control of any branch of government. Congress' establishment of the one-House veto in *Chadha*

B. Authorizing Private Citizens To Prosecute For Civil Penalties Violates The Appointments Clause Because Congress Can Assign This Executive Function Only To Presidential Appointees.

In accord with their intention to establish an independent Executive Branch, the Framers recognized that the power and duty to faithfully execute the laws must be accompanied by the Executive's right to choose subordinate officers to carry out that responsibility.

> The vesting of the Executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that *as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.*

Buckley, 424 U.S. at 135-136 (emphasis added), *quoting Myers v. United States*, 272 U.S. at 117. Express provision for such selection by the Executive is made in the Appointments Clause in Article II:

> [The President] shall nominate, and by and with the advice and consent of the Senate shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, § 2, Cl. 2.

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raised the problem of the exercise of unchecked power by a House of Congress and was objectionable on that ground, *inter alia*. 462 U.S. at 966 (Powell, J., concurring). The exercise of enforcement authority and prosecutorial discretion by private citizens under the Act is, by comparison, even less circumscribed by internal substantive constraints than was the one-House veto.

The Framers conceived the checks and balances implicit in the separation of powers as a "self-executing safeguard against the encroachment or aggrandizement of one Branch at the expense of the other." *Buckley*, 424 U.S. at 122. These express constraints have been held to be an absolute bar to infringement unless affirmatively superseded by other provisions of the Constitution.[14] *See e.g.*, *Chadha*, 462 U.S. at 955-956; *Buckley*, 424 U.S. at 127; *Myers v. United States*, 272 U.S. at 116.

The proscribed congressional "encroachment" or "aggrandizement"—that this Court has found unconstitutional so far—has been manifested in three principal ways: through the elimination of a constitutionally-authorized role of another Branch, *Chadha*, *supra*; through provision for the Legislative Branch's involvement in appointment or removal of individuals to carry out executive functions, *Buckley*, *supra*; and through the vesting of another Branch's powers in individuals who, although chosen without congressional involvement, are still not within the class of persons authorized under the Constitution to carry out such powers, *Northern Pipeline Construction Co.*, 458 U.S. at 87. Each of these types of encroachment arguably is involved in Congress' authorization of private citizens prosecuting Clean Water Act violations.[15]

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[14] The Framers also envisioned that only through specific authorization in the Constitution itself may one Branch have a "*partial agency* in" or "*control* over" the actions of another. The Federalist No. 47 (J. Madison) (Cooke ed.) (emphasis in original).

[15] Under part A, *supra*, the grant of prosecution authority to private citizens was shown to eliminate the Executive's role in federal enforcement with respect to violations prosecuted in private actions for civil penalties. Similar to the situation that arose with respect to the legislative veto in *Chadha*, Congress has authorized a mechanism in the Act under which the Executive's exclusive role also has been eliminated with respect to certain decisions in clear conflict with an express constitutional grant of authority.

1. *The Executive's Authority Under The Appointments Clause To Select Officers To Perform Executive Functions Has Been Interpreted Strictly.*

Congress' violation of the Constitution through its establishment of the Clean Water Act private prosecution authority becomes most evident in reviewing decisions of this Court addressing the Executive's power to appoint and control persons authorized to carry out executive functions. As noted previously, *Buckley v. Valeo* is the seminal decision that addresses this exclusive appointment authority of the Executive.

In *Buckley*, the Court overturned Congress' retention of a role for itself in selecting officers charged with the performance of executive authority similar to that involved here. There, the functions at issue were to be exercised by the Federal Election Commission, a majority of whose voting members Congress had selected. Among the Commission's powers was the authority to take enforcement action under the federal elections statute and regulations, including the initiation of civil suits.[16]

After reviewing the responsibilities of the Commisson, this Court concluded that none of the Commissioners' basic functions "operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration and enforcement of public laws to allow it to be performed by the present Commission." *Id.* at 141. The Court held that "[t]hese administrative functions may . . . be exercised *only by persons who are 'officers of the United States.'*" *Id.* (emphasis added). The Court stated further that "[u]nless their selection is elsewhere provided for, *all* Officers of the United States are to be appointed in accordance with the [Appoint-

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[16] The Court particularly emphasized the impermissibility of the Commission carrying out civil enforcement responsibilities. Yet, the largest civil penalty paid under the federal elections law has been $190,000—a review of Commission files through 1986 indicates. By contrast, amounts imposed in specific private prosecutions under the Clean Water Act in recent years have been in excess of $1,000,000, as occurred in this case.

ments] Clause." *Id.* at 132 (emphasis in original). Since certain members of the Commission had not been appointed by the President, the Court ruled that most of the powers of the Commission could not be exercised by the Commission as it was then constituted.[17] *Id.* at 143.

This Court recently confirmed the Executive's prerogatives with respect to officials who conduct executive functions in *Bowsher v. Synar*, *supra*, a separation of powers challenge to the Balanced Budget and Emergency Deficit Control Act of 1985 (the Gramm-Rudman-Hollings Act). There, the Court invalidated a key statutory provision on grounds that it vested executive authority in the Comptroller General, an officer removable by Congress. The Court stated that "[t]he structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Id.* at 5067. *See also Springer v. Philippine Islands*, 277 U.S. at 202 (not having the power of appointment, the legislature cannot vest executive duties in a legislative office).

In sum, *Buckley* and *Bowsher* expressly establish the principle that Congress can vest executive power only in Officers of the United States appointed by the President. Under the Necessary and Proper Clause, Congress can establish the means for implementing statutes, but its "power under that Clause is inevitably bounded by the

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[17] In *Melcher v. Federal Open Market Committee*, 644 F. Supp. 510 (D.D.C. 1986), the federal district court reviewed a challenge which alleged that Congress had vested the exercise of executive authority in the Federal Open Market Committee of the Federal Reserve, a body composed of private individuals appointed by Federal Reserve banks. The Committee's powers revolved around open market trading of government securities in the domestic market as an element of the Federal Reserve's function of promoting national economic goals. The court found that the Committee's activities need not be carried out exclusively by Presidential appointees. *Id.* at 523. However, the court pointedly noted that the Committee was not responsible for enforcing the law, thereby implying that the result might have been different if that had been the case. *Id.*, fn. 26.

express language of the Appointments Clause." *Buckley*, 424 U.S. at 138-139.

2. *Congress' Authorization Of Federal Enforcement Authority Being Carried Out By Private Citizens, Like Its Selection Of Specific Individuals, Encroaches Impermissibly On The Executive's Appointments Power.*

This Court's interpretations of the Appointments Clause that are relevant here have so far been exclusively in the context of Congress' granting authority to persons it selects or controls; however, the Court's rulings enunciate principles that are not restricted to circumstances involving such congressional "aggrandizement" at the expense of the Executive. That the Court has never been presented with a single opportunity to reach a decision in a precisely analogous context is hardly surprising in view of the unprecedented nature of Congress' authorizing private citizens to initiate prosecution for civil penalties, and in doing so, thereby displacing, and in many cases overriding, the Executive's prosecutorial discretion.

By reviewing *Buckley*, together with prior decisions involving Congress' authority to determine who may enforce federal law, the broader applicability of the underlying principle in *Buckley* that limits enforcement responsibilities on behalf of the public to only Presidential appointees becomes readily apparent. For example, in *Davis v. Passman*, 442 U.S. 228 (1979)—which involved Congress' creation of a private right of action, not an authorization for private citizens to prosecute federal law violations in actions seeking punitive relief—this Court stated, "[s]tatutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner." *Id.* at 242. If read out of context, this language would appear to conflict with *Buckley* and later decisions, which make clear that certain categories of persons clearly *cannot* be given executive powers. However, recognizing

the principle enunciated in *Buckley* as a constraint on the broad language in *Davis v. Passman*, any apparent inconsistency is eliminated and the ultimate governing doctrine becomes clear: Congress can determine who is to "enforce" the law, but it must delegate to Presidential appointees the authority to perform the civil enforcement powers of the federal government. The Legislature's powers are unconstrained in making such determinations only in authorizing private rights of action.

Recently, though, in *Chesapeake Bay Foundation, Inc. v. Bethlehem Steel Corp.*, Civil Action No. Y-84-1620 (D. Md. January 30, 1987), the district court found that the broad language in *Buckley* and *Bowsher* expressing the principle that only "Officers of the United States" may carry out executive functions is valid solely in the context where Congress has retained for itself a role in the selection or control of officers who perform such functions. The district court noted that the Court in those cases had emphasized the impermissibility of such congressional "aggrandizement", slip. op. at 4-5. However, it failed to point out that those cases only involved congressional aggrandizement. Nor did it discuss this Court's never having had an occasion to consider the constitutionality of a congressional grant to private citizens of prosecution authority that permits them to override the Executive's prosecutorial discretion.

The district court in *Bethlehem Steel* curiously found no need to limit the principles of *Davis v. Passman*, *supra*, to the facts presented, as it did with *Buckley* and *Bowsher*.[18] In quoting *Davis*, as the district court had done in *SPIRG v. Monsanto Co.*, 600 F. Supp. 1474

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[18] Similar selectivity in application of principles of other decisions is seen in the district court's reference to the statement in *Federal Open Market Committee*, *supra* n.17, to the effect that *Buckley* and *Bowsher* involved Congress' aggrandizement of its own role. However, the district court failed to point out that *Federal Open Market Committee* specifically noted that delegation of federal law enforcement to private individuals was not at issue there.

(D.N.J. 1985),[19] the court made no reference whatever to the fact that the *Davis* decision only addressed Congress' establishment of a private right of action.

In decisions involving the Judicial Branch, this Court has made clear, though, that the Constitution's constraints on congressional encroachment of another Branch's authority are not limited to situations where Congress' aggrandizement of its role is at issue. In *Northern Pipeline, supra*, the Court in considering an intrusion analogous to that presented here held that judges who are removable otherwise than as provided under Article III could not be granted constitutionally-established federal judicial authority, even though Congress had no control over the judicial selection or removal process. At issue there was Congress' vesting of authority to adjudicate bankruptcy cases in non-Article III judges. The Court held that Congress had "impermissibly removed . . . essential attributes of the judicial power from the Art. III district court, and ha[d] vested those attributes in a non-Art. III adjunct." 458 U.S. at 87. The Court concluded that Congress thus had exceeded its constitutional authority and impermissibly encroached upon the authority of the Judiciary.[20] Simi-

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[19] The *Monsanto* court also rejected a constitutional challenge to the private prosecution provision of the Clean Water Act. The court there also reached conclusions concerning the applicability of the separation of powers mandate to the Act's private prosecution authority which are not supportable under Article II and pertinent decisions of this Court. Defendant there, though, failed to cite *Buckley* and the other relevant separation of powers precedents. Thus, the court was not presented with an argument addressing, and in turn failed to recognize, the distinction between congressional delegation of *its own legislative authority* and congressional delegation of the Executive's *federal enforcement authority*. The *Monsanto* court's reasoning is flawed in ways similar to that in the *Bethlehem Steel* decision, and its conclusion that "Congress may vest enforcement power on whomever it pleases," 600 F. Supp. at 1478, is clearly not sustainable under the Appointments Clause as construed by this Court.

[20] In *Commodity Futures Trading Commission v. Schor*, —— U.S. ——, 106 S. Ct. 3245 (1986), this Court recognized that certain

larly, but seemingly even more objectionably, Congress' violation of the separation of powers doctrine here results from removing "essential attributes" of the Executive's enforcement authority by delegating it to unspecified private citizens—individuals who unlike the judges subjected to review in *Northern Pipeline* are not in the first instance selected by the Executive.

3. *Subjective Considerations, Such As Extent Of Encroachment And Putative Improvements In Government Efficiency, Are Not Relevant.*

In overturning congressional infringements of executive authority on separation of powers grounds, this Court has not looked to the extent of the alleged encroachment, or even to whether government efficiency would be enhanced, in reaching its judgment as to constitutionality. The Court's approach instead has been straightforward: If the function to be carried out is an executive function—an inquiry which this Court has reviewed carefully, and which unquestionably has been shown to be the case here—Congress must delegate implementation to one or more Presidential appointees.[21]

The extent of encroachment on the Executive's enforcement authority through actual private prosecutions, although substantial in recent years, has in fact varied

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limited encroachments on the judiciary's role are permissible, particularly where the parties waive their rights to adjudication by Article III courts. As in *Northern Pipeline*, the Court pointed out that it would look to whether "essential attributes" of the judiciary's role had been removed. Since the rights to be adjudicated were not provided for under the Constitution, this Court concluded that the encroachment under all of the circumstances presented did not have "the purpose of emasculating" Article III courts. *Id.* at 3257. By contrast, in cases where citizens pursue enforcement action, the private prosecution authority does emasculate the prosecutorial discretion of the Executive, an "essential attribute" of its constitutionally-created role.

[21] Under the Appointments Clause, the appointment of "inferior officers" may be vested "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., Art. II, § 2, cl. 2.

during the period since the Act's enactment. But the Executive Branch's prosecutorial discretion is such an "essential attribute" of its constitutional authority to enforce federal law that any unbridled delegation of enforcement responsibility to private individuals by itself results in a significant encroachment. The cases seem in any event to leave no room for finding a provision constitutional if Congress has infringed to any extent on the Executive's powers under Article II of the Constitution. For example, in *Bowsher v. Synar*, even though there was only a theoretical potential for congressional removal of an official appointed by the President, this Court held that that official could not be assigned executive functions. The *Bowsher* ruling shows that the real issue is whether an executive function has been assigned to someone not under the control of the President, not the likely extent of infringement.

Also not germane is an argument that authorizing private Clean Water Act prosecutions for civil penalties is an efficient supplement to executive enforcement. This Court in *Chadha* noted in connection with the one-House veto that, "[i]n purely practical terms, it is obviously easier for action to be taken by one House without submission to the President . . . ." 462 U.S. at 958-959. The Court then pointed out, however, that "it is crystal clear from the records of the [Constitutional] Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency," such as the "desire to define and limit the exercise of the newly created federal power." *Id.*

Moreover, there is no principle of constitutional interpretation that permits the avoidance of enforcing clearly expressed limits on legislative powers simply because it might appear that those limits are unnecessary at a particular time. Krattenmaker, "Article III and Judicial Independence: Why The New Bankruptcy Courts Are Unconstitutional," Geo. L.J. 297, 306 (1981). As the United States Department of Justice has stated:

> Of course it is quite irrelevant to the crucial importance of maintaining the integrity of these foundational [separation of powers] principles that in a particular instance where the principles are ignored, no immediate threat to individual liberty, or even to governmental responsibility, impends. What protects these values, and offers constant reassurance to the people of that protection, is the structure of the Constitution itself; and what threatens these values and the security of the people is any disposition to delapidate that structure. The Framers concerned themselves with potential abuses of power and sought to structure a system that would prevent or contain them in their incipiency.

Brief for the United States at 17, *Bowsher v. Synar*, Nos. 85-1377, 85-1378, 85-1379 (Sup. Ct., filed April 1986).

Accordingly, subjective value judgments as to the utility or intrusiveness of the Act's private prosecution authority for civil penalties are not pertinent to a determination regarding the authority's constitutionality.

4. *Congress' Otherwise Broad Powers Are Circumscribed So That Its Role In Designating Federal Law Enforcers To Act On The Public's Behalf Is Limited To Choosing Among Executive Officers.*

Congress' powers are extensive in various areas related to federal law enforcement to protect the public interest, but the Constitution draws a line short of the Legislature being authorized to displace the Executive's right to appoint the officials who are actually to carry out that enforcement responsibility. *See, e.g., Buckley, supra.* As noted in *Chadha*, the Framers were particularly conscious of the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . ." 462 U.S. at 951.

The Legislature's authority to delegate functions of the federal government is clearest with respect to the granting of quasi-*legislative* rulemaking power to federal agen-

cies, subject only to the constraint that Congress provide sufficiently precise standards to guide the exercise of such authority. *See, e.g., Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 646 (1980); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Congress also is conditionally empowered to appoint officers to carry out appropriate legislative functions.[22] *Buckley*, 424 U.S. at 127.

Similarly, Congress' right under the Constitution to enact laws in itself necessarily includes authority to provide for the enforcement of such laws. Congress thus can designate one or more Presidential appointees who are to exercise that enforcement authority. Indeed, in *Bowsher v. Synar*, this Court seemed to imply that Congress could have assigned the Comptroller General, an official appointed by the President, the authority to carry out executive functions, if it had not retained a direct role in his removal.

Congress additionally has the authority to regulate the performance of enforcement activities by executive officers. *See, e.g., Kalaris v. Donovan*, 697 F.2d 376, 398 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983). This right, however, is subject to the limitation that such regulation must not interfere with the constitutional duties of the Executive Branch. *Nixon v. Administrator*, 433 U.S. at 444-445.

Finally, as alluded to *supra*, it is clearly established that Congress can by statute vest in private persons the right to bring private actions to redress private in-

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[22] The Executive, like Congress, can delegate its *own* authority to officers of other Branches. In the case of such delegation, the separation of powers mandate is violated only if such vesting of authority in such officers interferes with that other Branch's carrying out of its constitutionally required powers. *See In Re: Application of President's Commission On Organized Crime, Subpoena of Scaduto*, 763 F.2d 1191 (11th Cir. 1985); *In Re: President's Commission on Organized Crime, Subpoena of Scarfo*, 783 F.2d 370 (3d Cir. 1986); *Nixon v. Administrator*, 433 U.S. 425, 433 (1977).

juries.[23] *Davis v. Passman, supra,* elaborates on this authority to create such private right of actions, which are permissible even where there may be significant benefits to the public at large.

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[23] Searching for an analogue to justify private prosecution for civil penalties, respondents might argue that civil penalty suits are only an updated version of the common law *qui tam* actions. This type of suit originated as a legal means for informers in England to obtain a bounty. The Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-466, permits informers to obtain bounties equivalent to one-half of whatever amounts are recovered. However, courts have uniformly ruled against the initiation of such suits by private individuals, holding that the right to bring them was granted exclusively to the United States Attorney General. *See, e.g., Jacklovich v. Interlake, Inc.,* 458 F.2d 923, 924 (7th Cir. 1972). It has also been held that a private prosecution brought under the Clean Water Act is not a *qui tam* action, because the Act requires that all penalties be paid to the federal Treasury. *Chesapeake Bay Foundation v. Bethlehem Steel Corp.,* 608 F. Supp. 440, 449 (D. Md. 1985). The only instances in which individual citizens have been authorized to initiate actions to recover any amounts payable in part to the federal Treasury appear to be *qui tam* actions outside the environmental area *where potential penalty amounts were very small.* For example, the False Claims Act, 31 U.S.C. § 3729, enacted in 1863, authorizes bounty hunters to bring actions to recover damages as well as a small amount to be forfeited by the defendant, and then keep one-half of any judgment. *See, e.g., United States ex. rel. Marcus v. Hess,* 317 U.S. 537 (1943). However, under this law and all other laws prior to the Clean Water Act, actions for penalties were only authorized to be brought by citizens in situations where the suing party was permitted to retain a share of the limited penalties that were potentially recoverable. Courts, moreover, have been uniformly reluctant to permit private citizens themselves to bring *qui tam* actions (as opposed to permitting the payment of a bounty after federal prosecution). *See,* discussion in *Connecticut Action Now, Inc. v. Roberts Plating Co.,* 457 F.2d 81, 84-85 (2d Cir. 1972). It is significant that the constitutionality of *qui tam* provisions has evidently never been subject to judicial review, certainly not since the holdings in *Buckley, Chadha,* and *Bowsher.* Also of significance is their origination in England under a non-constitutional form of government. *Qui tam* actions have been principally authorized to provide a means for private recoveries, and for that reason, they represent a much more limited infringement on the role of the Executive Branch than actions brought to recover civil

In sum, Congress has broad powers in implementing and delegating its *own* authority, as well as in prescribing constraints on the Executive's carrying out of executive authority. However, delegating executive authority to private citizens conflicts with the Constitution's separation of powers. Congress' role in selecting who may carry out federal enforcement is restricted to the right to choose among executive officials appointed by the President.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Rollins Environmental Services (NJ) Inc. urges that the Court reverse the decision below.

Respectfully submitted,

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penalties payable exclusively to the federal Treasury. Nevertheless, the *qui tam* authorizations *that allow actions for punitive relief to be prosecuted by private bounty hunters* are inconsistent with *Buckley* and related cases and the constitutional mandate of separation of powers.

FILED
MAR 30 1987

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

[redacted] LTD.,
Petitioner,

[redacted] INC.,

[redacted] COUNCIL,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[redacted]
AND INDUSTRY
ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BEST AVAILABLE COPY

QUESTION PRESENTED

Did the court below err in holding that citizen suits may be brought under the Clean Water Act, 33 U.S.C. §1365, seeking civil penalties for past violations against defendants who are currently in full compliance with the Act?

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Connecticut Business and Industry Association ("CBIA") is the largest business organization in the State of Connecticut, having 6300 members who employ a total workforce of over 700,000 employees. CBIA presents the views of its members on public policy and legal issues to legislative and judicial authorities.

CBIA and its members have been directly involved in the issue that is before the Court. Of the 54 Citizen Notices of Intent to sue filed in Connecticut since 1983, 42 have named CBIA members as defendants. These members have thus far paid over one million dollars in settlements, and other suits are still pending.

This Court previously granted CBIA's Motion for Leave to file a brief as amicus curiae in support of the petition for

certiorari herein. CBIA has received the written consent of all parties to file this brief, and said consents are filed herewith.

INTRODUCTION AND STATEMENT OF THE CASE

In its narrowest outlook this case concerns whether Gwaltney of Smithfield, Ltd., shall have to pay $1.3 million into the United States Treasury as a civil penalty on a suit brought by private plaintiffs, despite having already achieved full compliance with its permit requirement prior to the institution of this action.

But to an extent considerably beyond that of the usual case, this matter also involves issues which will have a significant continuing effect on a multitude of persons, business enterprises, and regulatory agencies throughout the nation. The citizen suit

provision at issue herein appears not only in the Clean Water Act, 33 U.S.C. §1365, but in relevant part also in two other major federal environmental statutes, RCRA and the "Superfund" statute, CERCLA. Under the Clean Water Act itself there are roughly 65,000 NPDES permits, the holders of which, even if presently in full compliance, may still be vulnerable to citizen suits under the interpretation suggested by the plaintiffs, Chesapeake Bay Foundation and Natural Resources Defense Council.

The plaintiffs' reading of the statute has already generated a substantial increase in citizen suit litigation under the Clean Water Act alone. The provision had been used sparingly prior to late 1982, an average of five times a year, but has since seen over 640 Notices of Intent to sue under §1365(a)(1).

The broader application of this case

will have major implications for a great number of environmental permittees and potential citizen organizations. Its implications differ significantly, however, from what CBF and NRDC argue. The outcome of this case will have no noticeable effect on compliance under these environmental statutes, as compliance is not at issue. Gwaltney was fully in compliance at the time suit was brought. In fact, unlike the wide open jurisdictional rule proposed by plaintiffs, a more moderate rule -- permitting citizen suit penalties for past violations only as to those parameters[1] for which a discharger is currently in violation (a variation on the rule adopted by the First Circuit) -- would create an

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1. NPDES permits are drawn in terms of the designated pollutants, or parameters, included in the discharge stream, and set separate and independent limitations for each parameter. 33 U.S.C. §1342(a), 40 C.F.R. §122.

even greater incentive to compliance.

What is at issue in this case is not compliance, then, but a question of the proper role of "citizen enforcers" under the statutory scheme, and whether they may be allowed, on the basis of this public right of action, in various respects to realize private benefits from a discharger's past non-compliance.

The enforcement provisions of the Act follow two tracks -- the prospective track, intended to abate current pollution and to ensure, by injunctive relief and the threat of penalties, its continued future control; and the retrospective, intended to apply civil penalties as a punitive measure for past violations. That a citizen plaintiff is authorized to exercise the prospective enforcement power

is clear. But to grant to citizen plaintiffs -- with their varied environmental priorities, their differing technical capabilities, and the dangerous potential for self-interest in the outcome -- authority to exercise the punitive aspect of the statute, is both improper under the Act and unwise public policy.

Congress quite clearly intended the role of these "citizen enforcers" to be one of providing a secondary line of defense, to protect the public environmental interest against present and prospective harm when the agency has failed to do so. Instead, plaintiff organizations have become little more than bounty hunters, using the statute's punitive measures and the federal courts as a means of advancing principally their own private interests.

The private interests of the plaintiff organizations are very clearly served by

these suits. The threat of penalties for past violations has allowed plaintiff organizations a significant measure of unjust enrichment, by "contributions" in lieu of civil penalties, and by substantial attorneys fees.

Citizen plaintiffs were never intended to possess the same enforcement powers under the Act as does the Administrator. While a plaintiff organization may surely use the Act as shield -- in prospective fashion to help in the protection of the public environmental interest -- its use as sword must properly be reserved to the Administrator, whose choice of punitive sanctions, their subject and their extent, may not be colored by a private interest in the outcome.

SUMMARY OF ARGUMENT

The Clean Water Act is so structured as to create a two-tiered enforcement authority. Primary enforcement authority is vested in the Administrator and the states. Citizen suits are intended only to provide supplementary and limited enforcement. The language of the citizen suits provision specifically limits jurisdiction to instances of present violations. The legislative history makes clear that Congress intended that citizen plaintiffs be authorized to enforce the Act only in prospective fashion, to abate present violations and employ the civil penalty sanction to ensure that compliance is achieved and maintained.

Congress also plainly intended to enact a citizen suit provision whose use would be restricted by the absence of any incentive to sue other than the protection

of the public health and welfare. There has, over the past four years, been a sudden and dramatic increase in citizen suits under the Act. The increase is the product not of any change in the statute, but of a judicial interpretation of the citizen suit provision to permit suit for civil penalties for past violations, in the absence of any current violation. The pattern and practice of these cases indicate that the opportunity for private gain to plaintiff organizations is their principal motivating factor. Such practice contravenes the manner in which Congress intended the citizen suit provision to be read.

The citizen suit provision must be interpreted to require a current violation in order to support jurisdiction. The "good-faith allegation" rule is based upon an analogy which is inappropriate. The proper interpretation is that a citizen

plaintiff may bring suit against any person who is in fact in violation of the statute at the time suit is file. Civil penalties, including penalties as to past violations of any parameter for which the defendant is currently in violation, would be among the available enforcement tools.

ARGUMENT

I. THE CLEAN WATER ACT CREATES A STATUTORY SCHEME WHICH LIMITS CITIZEN SUITS TO ABATEMENT OF PRESENT VIOLATIONS.

A. The Structure of the Act Gives Primary Enforcement Authority to the Government.

"Primary enforcement responsiblity under the Act lies with the states and the Administrator" of EPA. Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392, 395 (5th Cir. 1985). Citizen suits are intended to play only a supplemental, secondary role.

The Act assigns the Administrator and the states to the front line of the enforcement effort. As the Senate Report on the Clean Water Act noted, "The Committee intends the great volume of enforcement actions to be brought by the State." S. Rep. 414, 92d Cong, 1st Sess. at 64, reprinted in 2 A Legislative History of the Water Pollution Control Amendments of 1972 at 1482 (1972) (hereinafter "Leg. Hist."). "States desiring to administer their own permit programs must demonstrate that state officials possess adequate authority to abate violations through civil or criminal penalties or other means of enforcement. §402(b)(7), 33 USC §1342(b)(7)." Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 13 (1981).

The statute gives the Administrator even greater authority, both to enforce

the Act and to supervise state enforcement. EPA may issue compliance orders to violators, 33 U.S.C. §1319(a) (1977), and may sue for "appropriate relief," including injunctions and civil penalties. §1319(b). The Attorney General or U.S. Attorney may criminally prosecute violators. Under the recent amendments to the Act, EPA can exact administrative penalties of up to $25,000 per day. Water Quality Act of 1987, Pub. L. 100-4,, 101 Stat. 7, §314 (1987).

This elaborate enforcement structure is "supplemented" by citizen suits of a "limited nature." Middlesex County, 453 U.S. at 14, 17 n. 27. The supplementary and secondary role of citizen suits is demonstrated by the terms of the Act. At least 60 days prior to the filing of a citizen suit, the EPA, the state, and the alleged violator must be notified. A citizen suit is barred by the prior filing

of a complaint by the Administrator or by a state. 33 U.S.C. §1365(b). Citizens are permitted to sue only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility . . . ." 2 Leg. Hist. 1482.

B. The Statutory Language Creates Citizen Suit Jurisdiction Only As To Current Violations.

1. On Its Face the Statute Requires a Showing of Present Violation.

The Clean Water Act provides for federal jurisdiction over citizen suits against a private party "alleged to be in violation" of an effluent standard or limitation. 33 U.S.C. §1365(a)(1). This jurisdictional requirement is stated in the present tense.

The Fifth Circuit Court of Appeals has provided the clearest ruling on the issue, in Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392, 395 (1985):

> By its ordinary meaning, the language of §1365 requires an allegation of an ongoing violation . . . . Hamker asserts that "to be in violation of" means "to have violated"; however this interpretation obviously strains the grammar of the statute and diverges from its ordinary meaning. "[Section 1365] does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past. . . ." City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008, 1014 (7th Cir. 1979), cert. den., 444 U.S. 1025 (1980) (cited with approval in Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1, [18, n.28] (1981).

Where the language of a statute is plain on its face, the courts must apply that language, and not re-fashion the wording according to their own perception of what Congress meant to say. Consumer Products Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980).

The Hamker position is supported by decisions of this Court in Middlesex County and of the Seventh Circuit in City of Evansville, supra. Both cases presented claims for damages pursuant to

an implied private right of action under the Clean Water Act. The analysis necessarily demanded an examination of the nature and adequacy of the remedies which the Act expressly does provide. Both courts noted the statute's explicit limitations on citizen suits. The citizen suits provision "allows suits under the Act by private citizens, but authorizes only prospective relief," Middlesex County, 453 U.S. at 6 (emphasis supplied); and permits private citizens "to sue for injunctions to enforce" the statute. Id. at 14. The structure of the Act and its legislative history underscore "the limited nature of the citizen suits being authorized." Id. at 17, n. 27. Accord, City of Evansville, 604 F.2d at 1014.

The conclusion of the Court below in the instant case, that the language of the Act can be construed to permit suits for purely past violations, has also

recently been rejected by the First Circuit Court of Appeals. The Court below reasoned that a defendant "continues to be 'in violation' by having 'violated,'" analogizing the case to that of a taxpayer who underpaid in only one year. 791 F.2d 304 at 309. The analogy, however, fails.

> [I]n the case of the taxpayer, the violation was the non-payment, and it, of course, continued until the obligation was met. A ceased improper discharge does not "continue." Moreover, the "violation" defined by the statute is not the non-payment of the penalty.

Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 807 F.2d 1089, 1092 (1st Cir. 1986). The First Circuit concluded that the Act unambiguously restricts citizen suits to present violations, "particularly when it would have been so easy for Congress to have said 'has violated,' instead of 'is in violation' if the former was its intention, and with the difference being so conspicuous." Id.

Moreover, the 60-day notice requirement also implies that the alleged violator may avoid suit by achieving compliance. As the Hamker Court noted,

> §[I]t is most reasonable to read the requirement that notice also be given to the alleged violator as an indication that where the violator responds to the notice by bringing himself into compliance, the citizen loses the right to bring suit under §1365(a), just as he loses the right to commence an action where the Administrator or the state responds by diligently prosecuting an action against the alleged violator.

756 F.2d at 396.

2. Jurisdiction Under the Citizen Suit Provision is Not Analogous to Jurisdiction Over Governmental Enforcement Actions.

The Court below accepted the argument that the Clean Water Act draws no relevant distinction between citizen suits and government suits invoking federal court jurisdiction against violations. Since the United States can surely sue for

penalties for purely past violations under 33 U.S.C. §1319(b), the argument goes, citizens must also have the same authority under §1365. 791 F.2d at 309-310.

The Administrator's authority to sue for civil penalties for past violations is not, however, entirely clear, at least under the explicit terms of §1319. The Act provides only for jurisdiction over suits by the Administrator "for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order...." 33 U.S.C. §1319(b). Throughout §1319 the language is explicitly drawn in terms of prospective relief.

But the Administrator may appropriately be deemed to hold <u>implicit</u> enforcement authority under the Act as well, and it is in this important regard that the direct comparison between his

power and that of citizen plaintiffs breaks down. As the primary enforcer of the Act, the Administrator may be held to possess whatever reasonably implied enforcement authority is necessary to achieve the statutory goals. That authority has been held to be broadly construed to effectuate the purposes of the Act. Environmental Defense Fund v. Costle, 657 F. 2d 275 (D.C. Cir. 1981) (holding that any ambiguities as to the Administrator's enforcement powers are to be resolved in his favor). When the federal government sues to enforce the Act with civil penalties, the suit is "commenced by the United States," see, e.g., U.S. v. Earth Sciences,Inc., 599 F.2d 368 (10th Cir. 1979).Federal jurisdiction lies not under §1319 of the Clean Water Act, but under 28 U.S.C. §1345 which grants jurisdiction over cases commenced by the U.S.

No such implied right of action exists, however, for citizen plaintiffs, whose enforcement role is plainly limited and secondary under the Act. This Court has previously held that, "the remedial devices provided in" the Clean Water Act "are sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under Sec. 1983." Middlesex County, 453 U.S. 1, 20 (reversing National Sea Clammers Association v. New York, 612 F.2d 1222 (3d Cir. 1980), which had held that the district courts have federal question jurisdiction under 28 U.S.C. §1331 over citizen suits). Given the carefully crafted special jurisdictional grant of the citizen suits provision in the Clean Water Act, this Court held there to be no extra-statutory right of action on the

part of citizen plaintiffs, analogous to the Administrator's implicit and broad enforcement authority.

The statute itself seems to support this result, as it impliedly recognizes the Administration's authority to render post hoc "findings" of violation, an authority not reflected in the citizen suit provision. 33 U.S.C. §1319(a)(1); and see, Senate Consideration of the Report of the Conference Committee, October 4, 1972, reprinted in 1 Leg. Hist, at 174 (1973) (Administrator's duty to determine whether a violation "has occurred"); 118 Cong. Rec. 33,693.

3. The Legislative History Demonstrates Congress's Intent to Limit Citizen Suits to Abatement of Current Violations.

Congress intended in the Clean Water Act to write a statute whose meaning would

be clear on its face. "[W]e have tried in this legislation not to leave the final evaluation of the bill to legislative history, but instead to write into law as clearly as possible the intent of the Congress." Remarks of Sen. Muskie during Senate debate, 1 Leg. Hist., Vol 1 at 163-164 (1973).

While the statutory language speaks clearly, the legislative history further underscores Congress's intent to authorize citizen suits only to "abate" ongoing violations of the Act. The purpose of the citizen suits provision was described as permitting citizens to "seek compliance . . . with the Act," Water Pollution Control Legislation, Hearings Before the Subcommittee on Air and Water Pollution of the Committee on Public Works, United States Senate, 92d Congress, 1st Sess.,

Serial No. 92-H9 at 109; "to abate a violation," id. at 114; and to sue "for the purpose of abating pollution," Id. at 707 (comment of Sen. Eagleton). Accord, S. Rep. 414, 92d Cong., 1st Sess. at 79-81, reprinted in 1972 U.S. Code Cong. & Ad. News, vol. 2 at 3745 ("USCCAN") and in 2 Leg Hist. at 1482, 1497; 1 Leg. Hist. at 220-221. "Abate" means "to put an end to." Webster's New World Dictionary, p. 2 (1976).

4. The Legislative History Demonstrates That Congress Intended Not To Create a Private Incentive to Sue.

The legislative history also demonstrates that Congress intended to avoid creating a citizen suits provision which might be used as a source of private gain. Civil penalties payable under the Act -- $10,000 per day of violation, recently amended to $25,000 -- are

required to be paid to the U.S. Treasury, rather than to a private plaintiff. 1 Leg. Hist. at 674. Report of the Senate Public Works Comm. at 79, 2 Leg. Hist. at 1497. "[A] citizen can obtain an injunction but cannot obtain money damages for himself." 1 Leg. Hist. at 220-21 (comment of Sen. Bayh); see also, Middlesex County, 453 U.S. 1, 11.

Permitting citizen suits for past violations would defeat this Congressional intent:

> If §1365 were interpreted as permitting citizen suits for civil penalties for past violations, all state damage claims which could be brought under pendent jurisdiction could be litigated in a federal forum, thus undermining congressional intent to limit the burden on the district courts. Since the Act provides for awards of attorney's fees and expenses, there would be a substantial incentive to bring suit under the Act rather than in state court.

Hamker 756 F.2d at 396. The Fifth Circuit was concerned with the threat of pendent state damage claims, but the same

principle applies in the present case. Plaintiff organizations have used suits for past violations to obtain substantial settlement payments and attorneys fees. This is precisely the sort of private incentive to sue that Congress meant not to create.

The first citizen suits provision was in the Clean Air Act of 1970. It was the model for the Water Act version. It was also the subject of extensive debate over fears that it would be abused to clog an already congested federal court system. R. Schwartz & D. Hackett, Citizen Suits Against Private Industry Under the Clean Water Act, 17 Nat. Res. Lawyer 327 at 328 (1984). Some Congressmen expressed concern about frivolous or harassing suits, duplicative litigation, EPA enforcement decisions being overridden by citizen suits, and inconsistencies in enforcement policy. Id. at 328-29. In

response Senator Hart pointed out that the inability of plaintiffs to collect damages would limit the number of suits filed. Id.

The addition in the Clean Water Act of the provision empowering the Courts to assess "any appropriate civil penalties" was not discussed in the legislative history, Schwartz & Hackett at 331, except to specify that any such penalties be paid into the federal Treasury. Congress considered and specifically rejected the option of allowing citizens to collect part of the penalties. 1 Leg. Hist. at 220-21 (comment of Sen. Bayh); and see, Report of the Senate Public Works Comm. at 79, reprinted in 2 Leg. Hist. at 1497.

This Court has recognized, as has the Fifth Circuit in Hamker, that "one of the primary congressional purposes behind limiting citizen suits was to preclude the possibility that §1365 suits would place

an undue burden on the federal courts."

Hamker, 756 F.2d at 396.

> [T]he legislative history of the [Clean Air] Act contains explicit indications that private enforcement suits were intended to be limited to the injunctive relief expressly provided for. Senator Hart, for example, stated:
> "It has been argued, however, that conferring additional rights on the citizen may burden the courts unduly. I would argue that the citizen suit provision of §1358 has been carefully drafted to prevent this consequence from arising. First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. It will be the rare, rather than the ordinary, person, I suspect, who, with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill." 116 Cong. Rec. 33104 (1970).

Middlesex, 453 U.S. at 17, n. 27 (emphasis supplied). It was this measure, incorporated in the Clean Water Act, which Senator Muskie recognized as a "restrictive" citizen suits provision. Schwartz & Hackett, at 330. See also,

Hamker, 756 F.2d at 396 (availability of citizen suit for civil penalties for past violations, because Act allows for attorneys fee awards and expenses, would undermine congressional intent to limit actions to those brought solely to protect health and welfare).

II. THE CURRENT PATTERN OF USE OF CITIZEN SUITS DEMONSTRATES THAT THE BROAD JURISDICTIONAL READING PROPOSED BY THE PLAINTIFFS IS AT VARIANCE WITH THE INTENT OF CONGRESS.

The experience of the federal courts since 1983 underscores that the expansive reading of the statute adopted by the Fourth Circuit and other courts has generated an enormous increase in citizen suit litigation. Such litigation is motivated by the likelihood of substantial windfall financial benefits to plaintiff organizations, both from the pattern of out-of-court settlements which has developed, and from the availability of attorneys fees.

A. There Has Recently Been a Prolific Increase In Citizen Suits Under The Act, Largely As a Result of The Statutory Interpretation Which Is At Issue Herein.

For the first ten years, from its enactment in 1972 the citizen suits provision of the Clean Water Act was rarely used. During the four years from 1978 through 1981, for example, on average fewer than five such suits per year were filed nationwide. Env'l L. Institute, Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes ("ELI Study") III-10, 27, 29.

Beginning on September 17, 1982, with the filing of a group of 15 by one law office (variously on behalf of Sierra Club, NRDC, NJPIRG, and Friends of the Earth) the number of suits has increased dramatically. EPA, is entitled by law to receive a copy of each Notice of Intent to sue, 33 U.S.C. §1365(b)(1)(A);

but from the experience of the amicus, its records are incomplete. They do, however, reveal that in the past four years at a minimum 640 Notices have been filed. See Table, Appendix A, attached hereto.

It is uncertain precisely what percentage of these notices have subsequently been followed by litigation, as there has been, prior to the 1987 Clean Water Act Amendments, no requirement that EPA be notified of the filing of a Complaint. It is known, however, that at least 140 have resulted in federal court Complaints. And if Connecticut is any guide, the numbers are likely to be even higher. Of 54 Notices of Intent filed in Connecticut from 1983 to date, 37 (69%) have so far led to federal court

litigation.[2]

The citizen suit Notices have been broadly distributed geographically, with each of the ten EPA Regions and at least 38 states and the District of Columbia represented. See Table, Appendix B.

The cause of this sudden and dramatic increase in citizen suit litigation is apparent from its subsequent pattern and practice. The majority of these cases have been filed by a small group of plaintiff organizations, for which the suits have become a substantial revenue-raising device. Most of the Notices filed since September of 1982 -- 379 of the 648 Notices, or 59% - have been filed by or on behalf of only six

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2. By another account, of the 108 citizen suit notices filed in 1983 alone, 62 led to federal court suits, which together requested approximately $100 million in penalties. Lewis, "Environmentalists' Authority to Sue Industry for Civil Penalties Is Unconstitutional Under the Separation of Powers Doctrine," 16 Envir. Law Rep. 10101, 10102 (1986).

organizations: Natural Resources Defense Council, Sierra Club, Friends of the Earth, Atlantic States Legal Foundation, Connecticut Fund for the Environment, and New Jersey Student Public Interest Research Group. See Table, Appendix A.

There is, of course, nothing per se improper in so large a share of this litigation and threatened litigation being carried on by so limited a cast of plaintiffs. But the extent of the plaintiffs' practice in this area, and the pattern which it follows, are largely the product of a judicial interpretation of the citizen suit provision to permit jurisdiction for civil penalties for past violations. The result -- one of vastly increased litigation, motivated by the opportunity for substantial private gain -- is at great variance from the limited

secondary enforcement authority for citizens which Congress intended to provide.[3]

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3. The precedent to be established herein will have impact even beyond the 65,000 NPDES permits issued under the Clean Water Act. Citizen suit provisions in relevant respects identical to that found in the Clean Water Act have also been included in the Resource Conservation and Recovery Act, (RCRA) 42 U.S.C. §6972 (1984) (penalties of up to $25,000 per day of violation), and in the Superfund Amendments and Reauthorization Act of 1986, Pub.L. 99-499, 206, adding new §310 to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601, et seq. (1980), (penalties of up to $25,000 per day of violation for a first offense, and up to $75,000 per day for subsequent offenses).

B. Penalty Claims for Past Violations Are A Significant Factor In The Increased Number of Citizen Suits.

There is little question that jurisdiction over past violations -- whether in the absence of, or in conjunction with, present violations -- is a major element of the great majority of citizen suit Notices and litigation.

Due to the difficulty of obtaining complete information, it is impossible to state a precise total of those citizen suit claims which relate, as in the instant case, to purely past violations. Several relevant points can be made, however, from the available information.

More than 20 claims based on purely past violations have thus far reached the stage of reported decisions. Petition for Writ of Certiorari at 22, n.15. The numbers of those brought and unreported, settled, or still pending are likely to be considerably higher.

A review of the EPA files reveals that a significant number of Notices relate to purely past violations. Furthermore, a vast majority of the claims of violation made in virtually every Notice relate to permit parameters for which the defendant is in full compliance at the time the notice is filed.

Discharge Monitoring Reports, which are the source documents for the Notices, must be filed monthly with EPA. The time lag between the filing of a DMR and its availability to the public through EPA is commonly about one month. Chesapeake Bay Foundation and Natural Resources Defense Council v. Gwaltney of Smithfield, Ltd., 611 F.Supp. 1542, 1549 (E.D. Va. 1985). Even allowing, for the sake of argument, up to four months as a lag time by which to distinguish claims of current

violations from past violations, it is apparent that a significant proportion of the Notices concern purely past violations. Of the 353 Notices received from EPA which set forth the dates of violations, 281, or 80%, fail to allege any violations within three months prior to the date of Notice.

Among the remaining 72 Notices, even when a claim of an arguably "current" (within four months) violation is included in a Notice, on average 75% of the violations alleged are still for past violations on parameters for which the defendant is, at the time of the Notice, in full compliance. See Table, Appendix C.

That this litigation drive is generated by the jurisdictional finding at issue herein may also be inferred from an examination of the courts in which these cases have been filed. Of the 377 Notices

filed by the six active environmental groups since 1982, 234 (62%) have been filed in jurisdictions which have held that such suits can be brought for civil penalties for purely past violations. Only 39 have been filed in jurisdictions which have rejected this theory, and of those, all but two were filed in Texas or Louisiana prior to the decision in Hamker. No suits have been filed by the above environmental groups in the Fifth Circuit since Hamker or in the First Circuit since Pawtuxet Cove. If present violations were a more significant motivating factor, one would expect a more evenly distributed pattern of filings.

C. Citizen Suits For Civil Penalties For Past Violations Are Used For Substantial Private Gain.

Far from displaying the public environmental concern which Congress had intended would be the only incentive for such suits, the current pattern and

practice of those groups primarily responsible for the upsurge in Clean Water Act citizen suits instead appear to demonstrate a far more privately-interested motivation. The availability of steep civil penalties for what is an easily proved strict liability offense, in addition to an award of attorneys fees, almost invariably induces an out-of-court settlement on terms extremely advantageous to the plaintiff organizations. It is the judicial extension of citizen suit jurisdiction to past violations which has made this practice so lucrative, as there is nothing that defendants, having already achieved compliance, can do to cut off plaintiff's right of action.

The prosecution of a citizen suit for a past violation is relatively simple and straightforward. Holders of NPDES permits under the Act are required to monitor their effluent discharges and to file monthly Discharge Monitoring Reports. 33

U.S.C. 1318(a)(3)(A); 40 C.F.R. 122.41(l)(4). These DMRs are public records, and are typically the source documents for claims of violation. ELI Study at I-7, V-2, V-12. Courts have generally ruled that the DMRs constitute admissions, and some have held that they provide conclusive evidence of violation of the statute's strict liability standard. Student Public Interest Research Group of New Jersey v. Jersey Central Power Co., 642 F.Supp. 103 (D.N.J. 1986).

The courts which have allowed suit for past violations have generally borrowed a five-year statute of limitations.[4]

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4. While occasional courts have held there to be no statute of limitations for such actions, and have therefore permitted plaintiffs to go back indefinitely, Student Public Interest Research Group of New Jersey v. Tenneco Polymers, 602 F.Supp. 1394 (D.N.J. 1985); the more usual rule is to imply the general federal penalty statute of limitations of five years. 28 U.S.C. 2462. Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F.Supp. 284 (N.D.N.Y. 1986), and cases cited.

The statute, as recently amended, sets a civil penalty of "$25,000 per day for each violation," 33 U.S.C. 1319(d), and some courts, including the Court below in the instant matter, have interpreted that provision to permit an assessment of up to thirty times the daily maximum for violation of a single monthly average limitation (i.e., $750,000). 791 F.2d at 313-15. Given the severity of the potential penalty, plus attorneys fees and costs to the plaintiff, and given the unavailability of virtually all legal defenses, a defendant whose DMRs display even the slightest violation during the previous five years is likely to be disposed to settlement.

The settlement terms proferred by the plaintiff organizations provide further demonstration that the current tactic diverges significantly from Congress's

intended result.

> As a starting point, the environmental groups frequently inform target companies that their settlement goals include entry of a consent decree containing the following provisions:
> 1. civil penalties or alternatively, a contribution of a comparable amount to an environmental project located in the same state,. . . . .
> 4. reimbursement for the plaintiffs' attorney's fees and litigation costs.

Schwartz & Hackett at 328 (1984). See J. Miller, Private Enforcement of Federal Pollution Control Laws Part III, 14 Envtl. L. Rep.(Envtl. L. Inst.) 10407, 10426 (1984).

Consent decrees in citizen suits brought by environmental groups have typically included payments of up to $1,500,000 as "contributions" to environmental organizations in lieu of

civil penalties to the U.S. Treasury.[5] The agreement may also provide for a schedule of penalties in the event that the defendant violates the consent decree. In some instances, the plaintiffs themselves, or closely related organizations, have been the beneficiaries

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5. E.g., Chesapeake Bay Foundation & Natural Resources Defense Council v. Bethlehem Steel Corp., No. Y-84-1620 (D.Md Feb. 16, 1987) ($1,500,000 to unspecified environmental organizations in the Chesapeake Bay area, plus $500,000 to CBF and NRDC for "costs and fees"); Sierra Club v. Keystone Automotive Plating Co., No. HM 84-4020 (D.Md. May 30, 1986) ($400,000 to the Nature Conservancy); Student Public Interest Research Group of New Jersey v. Ragen Precision Industries, No. 83-1604 (D.N.J. Nov. 16, 1985) ($100,000 to the Passaic River Coalition); Sierra Club v. Aluminum Company of America, 585 F.Supp. 842 (N.D.N.Y. 1984) (consent decree Oct. 5, 1984) ($87,400 to the Adirondack Historical Association).

of these payments. See Table, Appendix D.[6]

In addition, the consent agreements usually provide for substantial attorneys fees and other litigation charges to be paid to the plaintiff organizations. Such fees sometimes exceed the amount of the

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6. E.g., Sierra Club and Natural Resources Defense Council v. Interpace Corp., No. 83-0127C (W.D.N.Y., Feb. 14, 1983) ($25,000 for environmental projects selected by plaintiffs); Sierra Club v. Philips ECG, No. 83-52T (W.D.N.Y. Jan. 25, 1983) ($15,000 to be used by Sierra Club for projects of its choice relating to Seneca River); Connecticut Fund for the Environment and Natural Resources Defense Council v. Bridgeport Brass Company, No. H-84-955 (D.Conn. Oct. 23, 1984) ($30,000 in an unrestricted contribution, plus up to $86,000 more in noncompliance penalties, to the Open Space Institute, an organization with the same address as the NRDC, and some of whose principals are the same as those of NRDC. ELI Study at IV-15).

penalty or "contribution."[7]

A comprehensive nationwide picture of the pattern of citizen suits and their settlement is difficult to provide. But a view of those notices filed in Connecticut is at least instructive, and may be representative of the nationwide practice.

The sudden upsurge of citizen suit activity in Connecticut began in September, 1983, with the filing of 21 Notices of Intent to sue. The Notices were filed jointly by the Connecticut Fund for the Environment ("CFE") and the

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7. E.g., Student Public Interest Research Group of New Jersey and Natural Resources Defense Council v. J.T. Baker Chemical Co., No. 83-685, (D.N.J., Jan. 19, 1984) ($10,000 civil penalty payable to U.S. Treasury and $29,000 in attorneys fees and other costs payable to plaintiffs); Hudson River Sloop Clearwater and Natural Resources Defense Council v. White Mop Wringer Co., No. 82-CV-1306 (N.D.N.Y., June 12, 1984) ($15,000 to Open Space Institute and up to $23,000 attorneys fees and other litigation expenses).

Natural Resources Defense Council ("NRDC"), and, except for the recitation of the particulars of the discharges, locations, and dates which allegedly violated the Act, the format and language of each notice is identical.

From 1983 through the present date, 54 notices are known to have been filed in Connecticut, 47 of which have been filed by CFE and NRDC. Of those 47 Notices filed, two have gone to judgment on the merits.[8] Three are still pending. The remaining 42 have been settled, 8 prior to the filing of a Complaint and the other 34 after suit had been instituted.

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8. CFE and NRDC v. Job Plating Co., 623 F.Supp. 207 (1985), Motion for Summary Judgment decided in favor of plaintiffs on Sept. 27, 1985, on basis that jurisdiction is available for civil penalties for purely past violations, settled for $77,500 after Court referred parties to Gwaltney lower court ruling for plaintiffs; CFE and NRDC v. Contract Plating Co., 631 F.Supp. 1291 (1986), citizen suit barred by State's diligent prosecution of prior suit.

According to a recent newspaper accounting, the settlements of the 28 litigation cases in Connecticut have netted at least $916,500 in environmental contributions in lieu of penalties, and an additional $484,250 in attorneys fees to the plaintiff organizations.[9] See Table, Appendix F. Figures for the 10 matters settled prior to suit are not known.

The private interests of the plaintiff organizations are very much at stake in this practice. Settlements have called for substantial "contributions" in lieu of penalties to the U.S. Treasury, a

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9. D.P. Jones, "Activists Pressure Polluters", Hartford Courant, October 6, 1986, p. 1, quoting counsel for CFE.

practice the Government finds objectionable.[10] And for those litigating environmental organizations with attorneys on staff, the significant attorneys fees usually included in these settlements, based not upon a salary rate but upon prevailing hourly rates, SPIRG v. AT&T Bell Laboratories, 24 Env. Rep. Cas.

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10. In an amicus brief filed in Student Public Interest Research Group of New Jersey v. Monsanto, 600 F.Supp. 1474 (D.N.J. 1985), the United States argued that an environmental plaintiff which settled a citizen suit for a payment to itself could be considered in violation of the Miscellaneous Fees Act, 31 U.S.C. §3302(c), which requires "[a] person having custody or possession of public money" to deposit it in the Treasury. Brief, at n. 31.

Even if the recent provision of the 1987 amendments, requiring notice to the Attorney General of any proposed consent judgment, P.L. 100-4, s. 504, (1987), serves to interrupt this practice as to cases filed in court, it will have no effect on those cases which are settled prior to the actual filing of a Complaint.

1986), (D. N.J. 1986) is an additional private benefit.[11]

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11. There is another very real, if by itself unobjectionable, private organizational interest also rewarded. The mere fact of bringing the litigation becomes a promotional tool by which to increase the organization's membership. The point is not that such practice is in any respect wrong, only that it creates a further "private benefit" incentive to such litigation, a result Congress did not intend.

D. Such Use of Citizen Suits Interferes With The Statutory Scheme.

The enforcement powers of the EPA and its delegated state agencies granted by the Act include both injunctive relief and penalty provisions. The ultimate goal of the statute is to eliminate the discharge of pollutants. 33 U.S.C §1251(a)(1). The NPDES permitting system regulates discharges to achieve interim water quality goals.

In carrying out its responsibility to achieve the statutory goals, a regulatory authority must have the discretion to choose to forego the imposition of a penalty as a means, whether informally by discussion or more formally by consent order, to persuade a more immediate, comprehensive, or far-reaching corrective measure. To allow private citizen groups to pursue an enforcement

option which the agency, in the exercise of its responsibility to achieve compliance, may have agreed to waive, is both impermissible under the Act and unsound public policy. It interferes with the agency's flexibility to negotiate solutions beyond bare compliance, and it creates a severe burden on the federal courts by leaving litigation as the only means to resolve a violation with finality.

The threat of penalties for any current violation, enforceable by the agency or by any citizen, is sufficient incentive to achieve minimal compliance. But it is the agency's power to seek penalties for past violations, or to waive that right, which enables it to influence settlements providing, as in the instant case, for new state-of-the-art treatment systems which go beyond the bare minimum of compliance with the permit terms.

The court below found some significance in the argument that authorizing citizen suits for past violations would have a beneficial deterrent effect on other violators. 791 F.2d at 309-10. In fact, however, it is likely to have somewhat the reverse effect, by reducing the incentive to comply.

If citizen suits are limited to current violations, a discharger has a stronger incentive to achieve compliance quickly. Compliance would cut off a citizen right of action, and would avoid penalties for both past and future violations, rather than only for future violations. Limiting citizen suits to ongoing violations provides the greater marginal deterrence, and thus the greater incentive to compliance.

III. UNDER THE CORRECT JURISDICTIONAL RULE, A CITIZEN SUIT IS AVAILABLE ONLY IF THE ACT IS IN FACT VIOLATED AT THE TIME SUIT IS FILED.

A. The Jurisdictional Test Should Reflect the Factual Standard For Injunctive Relief.

Of major concern to the courts below has been that if citizen suits are restricted to abatement of present violations they may be excessively limited "as a tool of enforcement and deterrence." 791 F.2d at 313. An intermittent, or "chronic episodic" violator, whether deliberate or not, may evade the Act's enforcement provisions. Gwaltney, 611 F.Supp. 1542, at 1548. Because the courts below could see no clear standard by which to distinguish between an intermittent violator and an ex-violator, they rejected the rule adopted in Hamker.

However, the problem of the deceptive or "chronic episodic" violator was more properly addressed in Judge Williams's concurrence in Hamker:

> . . . [T]he requirement that the polluter be "in violation" clearly is broad enough to cover the chronic episodic violator or the violator who intentionally "turns off the spigot" just before a citizen brings suit. In either of these circumstances, the statute should surely be interpreted to cover such violations as being current. 756 F.2d at 399.

The First Circuit in Pawtuxet Cove has provided a further refinement that strengthens the argument for the Hamker rule, by offering a standard to determine which violations are "current":

> If a defendant's history of past violations is such that it is reasonable to believe that misconduct will continue, not only is it reasonable to allege a continuing violation, but this is precisely the showing that would induce a court to issue an injunction.
>
> . . . In reviewing actions under this standard, the district court should consider, among other things, the isolated or recurrent nature of the infraction, the degree of scienter on the part of the defendant, and the sincerity of its assurances against

future violations.

Pawtuxet Cove, 807 F.2d at 1094.

The legislative history supports the application of parallel standards for jurisdiction and for injunctive relief in such suits because they are designed for the same purpose. As the First Circuit itself said in Pawtuxet Cove:

> The Clean Air Act, from which the Clean Water Act took the phrase "is . . .in violation," see 42 U.S.C. §7604(a), provided for injunctive relief only. . . . [E]ven when in enacting the Clean Water Act, Congress added penalties, such were to go to the government. There was no change in purpose. Rather, House and Senate Reports on the Clean Water Act characterize the addition of civil penalties as simply a modification of the citizen's action for injunction authorized under the Clean Air Act. . . . [P]ast permit violations are relevant to the extent that they cast light on the propriety of an injunction, no longer appropriate if there is no longer a permit.

Pawtuxet Cove at 807 F.2d at 1092-1093, (emphasis supplied).

The standard proposed, then, is that the citizen suit provision be "construed to comport with the injunctive purpose of

the Act --[to provide for federal court jurisdiction over] conduct indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one." Id.[12]

The availability of "any appropriate" civil penalties leads to no different rule in the application of the Act's enforcement provisions. Once jurisdiction obtains, by a "current violation" under the injunctive standard stated above, then civil penalties may be found an "appropriate" enforcement tool. As part of a history of recalcitrance, for

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12. There may be cases in which the pollution ceases between the time suit is filed and the time of the injunction hearing. In such a case the court would have jurisdiction, and would consider the facts at both times, and may impose penalties without granting an injunction.

example, past violations may be a valid consideration in determining the propriety of injunctive relief and/or a civil penalty.

The NPDES regulations under the Act, however, and the permits assigned thereunder, treat each permit parameter as a separate discharge limitation. 33 U.S.C. §1319(d), 40 C.F.R. §122. The limit for each pollutant is distinct, and violation of one need not in any way implicate the discharge level of another. Consistent with this approach, and with the proper role of citizen enforcers under the Act, the citizen suit jurisdictional standard should be applied on a "per parameter" basis. Jurisdiction over a continuing violation of one parameter offers no justification for jurisdiction

over an entirely unrelated parameter for which the permittee is in full compliance.[13]

Thus, the First Circuit has stated a clear and workable standard for determining whether a violation is "continuing", for purposes of establishing citizen suit jurisdiction.

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13. The 1987 Clean Water Act Amendments lend further support to this approach, by revising the penalty rule to read "$25,000 per day for each violation." The new language would appear to treat violations distinctly on a "per parameter" basis.

B. The Jurisdictional Test Should Be The Actual Fact of a Continuing Violation, and Not One of Merely Good Faith Pleading.

Having presented a clear factual jurisdictional standard, the Pawtuxet Court proceeded, without rationale other than an inapt analogy, to hold that the test by which the standard is measured is one of "good faith pleading." Such a result would seriously undermine the factual injunction standard, and serves no practical purpose.

The First Circuit made this shift for two reasons. First, it wished to avoid having jurisdiction turn on proof that a violation was "occurring at the instant of

suit." 807 F.2d at 1093. Second, to avoid this it seized on the word "alleged" in §1365(a)(1) to suggest that there need not be an actual violation at the time suit is filed so long as one is merely alleged. The Court analogized the citizen suit provision to the amount in controversy requirement in diversity cases. 807 F.2d at 1093.

The analogy, however, is both unnecessary and inapt. It is unnecessary because the First Circuit's own analysis of "continuing" violations as those for which injunctions are appropriate solves the problem. Jurisdiction need not depend on proof that there is an illegal discharge at the very instant of suit. A reasonable likelihood of a current or future violation, based upon the same objective factual standard as for injunctive relief, will be sufficient.

And the analogy itself fails because

the rationale for the amount in controversy rule is entirely different from the rationale for limiting citizen suits to present violations.

A more appropriate analogy -- to diversity or to federal question jurisdiction, for instance -- would lead to a different result. Generally, questions of federal jurisdiction are questions of fact, not merely of pleading. Federal courts are courts of limited jurisdiction; if at any point it becomes clear that a fact essential to jurisdiction is absent, the suit must be dismissed. American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951). And see, Land v. Dollar, 330 U.S. 731, 735 (1947) (plaintiff has the burden of proving jurisdictional facts by a preponderance of the evidence); McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 184 (1936) (trial court not bound by pleadings, but

may inquire into jurisdictional facts).

Moreover, even the "jurisdictional amount" requirement is no exception to the general rule that questions of jurisdiction are questions of fact. "Good faith" is measured objectively, as a question of fact. "[T]he appropriate legal test of plaintiff's good faith is not his subjective state of mind but a very strict objective standard." Jones v. Landry, 387 F.2d 102 (5th Cir. 1967). Where the plaintiff makes an honest error in alleging that the amount in controversy exceeds the jurisdictional limits, but discovery demonstrates that the amount is certainly less, the suit will be dismissed for lack of jurisdiction. American Mutual Liability Ins. Co. v. Campbell Lumber Mfg. Corp., 329 F.Supp. 1283 (N.D. Ga. 1971).

The plaintiff must prove that there is in fact a "current violation", within the broad meaning of that phrase suggested by

Pawtuxet Cove and the concurring opinion of Judge Williams in Hamker. Where, at the time suit is filed, there is in fact no such "current violation," then neither injunctive relief nor a civil penalty is or will be appropriate, and jurisdiction does not lie.

CONCLUSION

The broader aspect of this case concerns what the amicus contends is both the illegality and the impropriety of the "vigilante-style" citizen suit litigation currently being conducted under the aegis of jurisdiction over past violations. If such suits are sanctioned by this Court, they will only increase further in numbers, as tens of thousands of permit-holders under three major federal environmental statutes are subject to the same citizen suits provision.

The rule of law which would enable these plaintiff organizations to continue

to pursue their litigation and settlement campaign is one which will apply to all plaintiffs. A citizen suit for even a single minor and technical violation of the Act five years prior to the filing of a Complaint will be made possible by the plaintiffs' statutory reading. Since a DMR admits liability, and since the statute provides a strict liability standard, $25,000 potential penalty, and attorneys fees in any event, there is little if any incentive not to sue for even the most trivial violation. This is certainly not the result that Congress intended.

For the reasons stated above, the amicus respectfully submits that this Court should reverse the decision of the Fourth Circuit below, and hold that the federal courts lack subject matter jurisdiction over citizen suits seeking civil penalties for past violations.

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Appendix A

CITIZEN SUIT NOTICES BY YEAR

Year	All Notices	Notices Filed By Major Environmental Groups*
1978	1	Unknown
1979	9	Unknown
1980	6	Unknown
1981	6	Unknown
1982	17	13
1983	110	88
1984	178	121
1985	135	36
1986	205	119
Totals	667	377

* Natural Resources Defense Council, Atlantic States Legal Foundation, Connecticut Fund for the Environment, Friends of the Earth, Sierra Club, Student Public Interest Research Group of New Jersey.

Appendix B

CITIZEN SUIT NOTICES BY EPA REGION
1982-1986

Region	All Notices	Notices Filed By Major Environmental Groups*
I	109	92
II	109	78
III	135	69
IV	54	11
V	110	71
VI	72	34
VII	3	0
VIII	2	0
IX	28	11
X	23	11
Totals	645	377

* Natural Resources Defense Council, Atlantic States Legal Foundation, Connecticut Fund for the Environment, Friends of the Earth, Sierra Club, Student Public Interest Research Group of New Jersey.

Appendix C

PAST VIOLATION CLAIMS IN CITIZEN SUIT NOTICES (1982 - 1986)

PER-NOTICE BASIS[1]

	Total Notices	Time Lag[3] < 4 Mos.	%	Time Lag 4 Mos. +	%
1982	13	1	8	12	92
1983	60	10	17	50	83
1984	119	22	18	97	82
1985	48	14	29	34	71
1986	113	25	22	88	78
	353	72	20	281	80

PER-PARAMETER BASIS[2]

	Total Parameters	Time Lag < 4 Mos.	%	Time Lag 4 Mos. +	%
'82-'86	4288	227	5	4061	95

1. "Per-Notice Basis" analyzes each Notice independently, in terms of most recent claim of violation cited in Notice.
2. "Per-Parameter Basis" analyzes each Parameter independently in terms of most recent claim of violation of that Parameter cited in Notice.
3. "Time Lag" is the period of time between the most recent claim of violation and the date of the Notice.

Appendix D

CITIZEN SUIT SETTLEMENTS
1/1/83 - 12/31/86

Connecticut Cases

Notices filed	54	
Notices by CFE/NRDC*	47	
Suits Filed	37	
Suits by CFE/NRDC	37	
Settlements	30	
Contributions to Open Space Institute		$869,500
Payments to CT DEP		67,500
Payment to Middleburg Land Trust (est.)		12,000
Payments to unknown recipients		87,000
Payments to U.S. Treasury		0
Sub-total		1,036,000
Payments to CFE/NRDC for costs/atty. fees		492,036
Total payments		$1,528,036

Other Cases (Non-Connecticut)

Known settlements (31)	
Payments to U.S. Treasury	$723,900
Payments to others**	3,692,050
Sub-total	$4,415,950
Known attorneys fee/ costs payments (16)	720,488
Total known payments	$5,136,438
Total of all known (61) settlements	$6,664,474

* Connecticut Fund for the Environment, and Natural Resources Defense Council.

** Recipients are usually environmental organizations, or in few instances public-sector state or local entities.

Supreme Court, U.S.
FILED
MAR 27 1987
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CLERK

(12)

No. 86-473

October Term, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.

and

NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

BRIEF OF *AMICI CURIAE* MID-ATLANTIC LEGAL FOUNDATION, INC. AND CONSUMER ALERT IN SUPPORT OF PETITIONER

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pmp

QUESTION PRESENTED

By adopting the citizen suit provisions of the federal Clean Water Act, did Congress intend to empower individual citizens to punish operators of economically and socially productive facilities who, by the exercise of diligence, good faith and state-of-the-art technology, have accomplished compliance with the permit provisions of the Act?

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No. 86-473

In the
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BRIEF OF *AMICI CURIAE* MID-ATLANTIC LEGAL FOUNDATION, INC. AND CONSUMER ALERT IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI*

Pursuant to the Court's Rule 42, Mid-Atlantic Legal Foundation, Inc. and Consumer Alert hereby move the Court for leave to file the attached brief as *amici curiae*. Consent was secured from counsel for all parties. Copies of the letters of consent have been filed with the Court.

Mid-Atlantic Legal Foundation, Inc., is a non-profit, tax-exempt corporation organized and existing under the laws of Pennsylvania. It is a law firm which seeks to present balanced articulation of the public interest in matters of broad impact such as the instant case.

Consumer Alert is a non-profit corporation organized and existing under the laws of the District of Columbia. It is a nationwide organization composed of over 6,000 members of whom approximately 160 are residents of Virginia. Consumer Alert engages in the study and dissemination of information on problems and issues affecting American consumers. Its principal objective is to ensure fair and fully expositive presentations of matters affecting the public interest.

STATEMENT OF THE CASE

For the sake of brevity *amici* do not separately set forth their statement of the case but adopt that of petitioner.

Amici do set forth certain key facts and the issues presented by those facts to the courts below and here.

(a) *Key Facts*

October 27, 1981	Petitioner acquires existing operating facility and shortly thereafter learns of permit exceedences.
October 1982	Interrelated chlorine/fecal coliform problem solved.
October 1983	State-of-the-art waste water treatment facility in place and debugging.
Winter-Spring 1983-1984	Isolated start-up exceedences only.
May 15, 1984	Last nitrogen exceedence recorded.
June 15, 1984	Citizen suit commenced.

From May 15, 1984 to the present, a period of two and three-quarter years, no exceedences have occurred, save one attributable to an Act of God.

(b) *The Issue*

The issue as perceived and defined by the courts below was whether a continuing violation is necessary to confer subject matter jurisdiction over citizen suits seeking penalties for wholly past violations.

Amici suggest that the issue should be defined differently: Did Congress intend to confer subject matter jurisdiction over suits by individual citizens which seek penalties for wholly past violations which occurred in a period during which the operator

1. acted in good faith,
2. with reasonable diligence,
3. solved permit problems,
4. employed state-of-the art technology in the process, and
5. accomplished full, effective, long-term compliance with its permits.

ARGUMENT

Amici respectfully argue that this court should answer no to the issue as framed by *amici*, under precedent of this Court, under proper principles of statutory construction, and as a matter of sound judicial policy.

I

Precedent

This Court has already recognized and pronounced that the Act allows suits by private citizens but authorizes only prospective relief. [*Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 6, (1981)].

The Court in *Sea Clammers* further recited that the citizen suit provisions authorize private persons to sue for injunctions to enforce the Act. (*Id.*, 453 U.S., at 14).

The Court further acknowledged that in a proper injunction case, the district court may order civil penalties payable to the government. (*Sea Clammers*, n. 25).

As the Court's discussion indicated, the existence of a legitimate need for injunction in order to enforce the Act is the jurisdictional predicate of an action in which civil penalties may be added.[1]

II

Statutory Construction

A. "To be in violation"

1. *Statutory Language*

The statutory language is clear. A citizen suit may be brought only if the defendant is alleged *to be* in violation of an effluent standard or limitation. [Clean Water Act, Section 505(a), 33 U.S.C., Section 1365(a), hereinafter cited as Section 505(a)].

If Congress intended district courts to exercise jurisdiction over wholly past violations, it could easily have drafted "is alleged to be or to have been in violation." It did not do so.

---

1. To note the harmony of statutory reading between Congress and this Court, please see citation to legislative history of citizen suit purposes at 7, *infra*.

2. *Legislative History*

Failing to find "have been" in the statute, the Court below cited language used by Senator Muskie that a suit might be brought " 'for an appropriate remedy in the case of any person who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one.' 118 Cong. Rec. 33700 (1972)." (791 F.2d 304, 311-12).

That reliance is wholly misplaced, however, and in any event misreads Senator Muskie's language.

(a) The quoted "have been" language was written. If "to be" in the statute were meant to include "have been," the statute could have been so drafted as it was in Sen. Muskie's written discussion.

(b) In any event, however, the "have been" phrase did not address civil penalties for wholly past violations as are presented by this case. Mr. Muskie was simply explaining that "an appropriate remedy", injunctive relief, might be sought in a proper case notwithstanding the sixty day notice period placed in the bill by the House conferees.

(c) Mr. Muskie meant what he said, *i.e.*, that injunctive relief might continue to be the subject of a legitimate citizen action whether the violation were "continuous," "occasional," "sporadic," or "intermittent," and that an injunction might issue to order the cessation of an outfall's violation whether the outfall was continuously freeflowing, or the producer of violations recurring in varying the lengths of time.

Whether the violation is less than continuous or continuous, it must be ongoing in order to give rise to a proper case to enforce the statute.

(d) Mr. Muskie's concern with technologically unremedied violations of outfalls less than continuous and the meaning of such words as "intermittant" is further clarifed by his discussion of the Administrator's responsibilities:

> The Administrator must issue an abatement order whenever there is a violation of the terms or conditions of a permit, including the effluent limitations, time schedules, and monitoring requirements. Should he fail to issue an order, a citizen suit may be brought against him to direct the issuance of such an order. The Administrator's authority is not limited to those cases in which there is a continuing violation. Any discharge, intermittent or continuous, which the administrator finds violates the terms of the permit, is to be enforced. The conferees expect that the Administrator will act as aggressively against those violations which only intermittently occur as he will act against those violations which occur on a continuous basis. Failure to take this kind of effective action will permit intermittent dumping of waste with impunity. Citizen suits can be brought to enforce against both continuous and intermittent violations.

118 Cong. Rec. 33693 (1972).

B. Jurisdictional Predicate

1. *Statutory Language*

That an unremedied violative discharge is the jurisdictional predicate for a citizen suit under Section 505 may be seen from simple application of plain English and rules of grammar.

The firs: paragraph of Section 505 states that a citizen suit may be brought against any person alleged to be in violation of (A) an effluent standard *or* limitation; *or* (*B*) an order, *or* against the Administrator to force him to act.

The second paragraph recites, in parallel, that district courts will have jurisdiction to enforce such a standard *or* limitation *or* such an order *or* to order the

Administrator to act *and* to apply any appropriate civil penalties.[2]

The jurisdictional predicate is an offending discharge in need of remedy and an operator as to whom the statute must be enforced. If Congress intended actions to be for wholly past violations, it could easily have drafted the second paragraph to provide jurisdiction to enforce standards, *or* an order administrative action *or* to apply civil penalties. It did not do so.

2. *Legislative History*

Amici suggest that Congress did not so draft because it never intended jurisdiction to lie for purely punitive action but only for cases involving the necessity of remedial action.

Congress understood that the jurisdictional predicate for a citizen suit was a discharge requiring enforcement by injunction in order that standards be attained and said so.

In the written words of Senator Boggs:

> "CITIZEN SUITS
>
> This bill creates a mechanism allowing private citizens to go to court to assure the attainment of pollution-control standards."

118 Cong. Rec. 33715 (1972).

In cases such as that presented here, the jurisdictional predicate to a citizen suit simply does not exist. Petitioners in a systematic program of correction culminating in outfall control under state-of-the-art technology achieved complete compliance with permit

2. *Amici* suggest plain meanings of words. Webster's defines "to enforce" as "to compel observance of; as to enforce the laws." [*Webster's Unabridged Dictionary*, 2d Ed. 1980]. Black's defines "enforce" as: "to put into execution; to cause to take effect; to make effective; as, to enforce a particular law . . . ; to compel obedience to." [Black's Law Dictionary, 5th Ed. (1979)].

Clearly, in a civil context, if one is observing and obeying the laws they need not be enforced as against him.

limitations. No exceedences have occurred for two and three-quarter years but one attributable to an Act of God. No injunction is necessary to compel Petitioners to meet the required standards. They have done so long since and did so prior to commencement of the instant action. The district court lacked subject matter jurisdiction.

C. Lower Court Errors

The object of the Act is clean water and compliance by dischargers with their permits. It is clear from statutory language and legislative history that citizen suits were intended to be grounded — as a jurisdictional matter — on the necessity of injuction required to abate violations and achieve compliance. [*See*, 33 U.S.C. §1319; Section 505; comments of Senators Boggs and Bayh at 118 Cong. Rec., 33715-33716].

Nevertheless, the Fourth Circuit below and various district courts have sought to find justification for allowing civil penalties for solely past violations. In doing so they have ignored the role Congress carefully crafted for citizen suits as an enforcement tool to force the achievement of compliance, and instead have elevated citizen suits to new levels under which achievement of compliance is rendered essentially irrelevant.

The conversion has been accomplished by assigning merely plausible constructions to language (791 F.2d, at 309) and by adopting presumptions and inversions of logic. For examples:

(a) The court below reasoned that "[a] significant deterrent would be lost if citizen suits seeking civil penalties for past violations were not permitted." The statement begged the issue in two respects. First, the issue is not whether civil penalties would ever be proper in a citizen suit. In a right case they would be. The issue is whether they are recoverable for wholly past violations after compliance has been achieved.

Second, the issue is not whether civil penalties are or are not a deterrent, in and of themselves, but whether

Congress intended them to apply after compliance has been achieved and enforcement by injunction rendered unnecessary.

(b) The court stated that "[w]hile it cannot be denied that citizens' enforcement authority is narrower than that of government — citizens, for example, obviously cannot seek criminal penalties or issue compliance orders — the Act does not deprive citizens of the right to sue for past violations." (791 F.2d, at 310).

Again the distinction between penalties in a right case and one where compliance has been achieved was ignored and the issue begged.

Moreover, the issue before the court was the scope of enforcement rights and powers established by the Act. The issue therefore was not whether the Act *deprives* citizens of a personal right to sue for wholly past violations but whether the Act *grants* such a right.

(c) Acknowledging the distinction between the threshold issue of jurisdiction and that of remedy, the court below completed its legislative task by inverting the concepts. The Fourth Circuit said:

> Gwaltney criticizes the logic of these [district court] opinions, arguing that they confuse the threshold issue of jurisdiction with the issue of penalties available once jurisdiction attaches and liability is found. Gwaltney contends that although the Act does provide for civil penalties, and even for penalties based on past violations, no relief whatsoever is available unless there is an ongoing violation on which to ground jurisdiction under section 505(a).
>
> There is some merit to this argument, because technically the issues of jurisdiction and penalties are analytically distinct. However, the Act's provision for civil penalties in citizen suits cannot be *totally ignored*. When read in conjunction with the Act's overall structure and its legislative history, it suggests strongly that citizens *should* be allowed to

seek civil penalties for past violations even in the absence of an ongoing violation. (791 F.2d, at 310, n.11) (emphasis supplied).

The Court reasoned that because penalties may be applied *if* jurisdiction attached, *therefore* jurisdiction attached.

The reasoning of the court below, and the district courts upon which it relied, demonstrate a predisposition to expansive interpretation of the citizen suit provisions and of the rights of citizen plaintiffs thereunder.

That predisposition, however, is at direct odds with the careful draftsmenship of the statute and of Congress' concern, almost to the point of preoccupation, that citizen suits be limited to injunction actions, *i.e.*, to situations in which injunctive enforcement is necessary to the achievement of compliance with the Act.

In situations such as that presented in the instant case, the factual predicates to such actions simply do not exist. Compliance has already been achieved.

III

Judicial Policy

The application in citizen suits of civil penalties for wholly past violations should be disallowed on two important grounds which may be viewed as statutory construction or sound judicial policy or both.

A. Motivation and Equity

In their statement of the issue *amici* ask whether Congress intended to empower citizens to punish plant operators who had achieved compliance by the application of diligence and state-of-the-art technology.

To support their suggestion that punishment *per se* as well as the desire to profit financially are significant motivations underlying at least some of these cases,

amici, as *amici curiae*, share with the Court salient portions of a recent memorandum of a group considering becoming plaintiffs in new cases.

> Polluters found liable are assessed penalties. (In the only case which wasn't settled, the court assessed a $1.28 Million penalty against a company on Chesapeake Bay.) These citizen suit provisions could be utilized by NYPIRG [New York Public Interest Research Group, Inc.] to punish polluters, gain publicity, steer a significant amount of money to worthwhile environmental projects, and conceivably, to bring money to NYPIRG in the form of legal fees to attorneys and scientific 'experts.'
>
> * * *
>
> [A plaintiff's environmental] law firm has brought approximately 26 suits under the Clean Water Act against 'direct dischargers' in New York and New Jersey (in fact, NJPIRG claims that the suits they file will provide a significant source of income for them) (*sic*), Friends of the Earth and Atlantic States Legal Foundation in New York.[3,4]

---

3. NJPIRG is an acronym for New Jersey Public Interest Research Group a/k/a Student Public Interest Research Group.

4. *Cf., Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284 (N.D.N.Y. 1986); *Friends of the Earth v. Archer Daniels Midland Co.*, No. 84 Civ. 413 (N.D.N.Y. 1986); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (Cir. 1985); *Friends of the Earth v. Facet Enterprises, Inc.*, 618 F.Supp. 532 (W.D.N.Y. 1984); *Student Public Interest Research Group v. AT&T Bell Laboratories*, 617 F.Supp. 1190 (D.N.J. 1985); *Student Public Interest Research Group v. Anchor Thread Co.*, 22 Env't. Rep. Cas. (BNA) 1150 (D.N.J. 1984); *Student Public Interest Research Group v. Georgia-Pacific Corp.*, 615 F.Supp. 1419 (D.N.J. 1985); *Student Public Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1474 (D.N.J. 1985); *Student Public Interest Research Group v. National Starch and Chemical Corp.*, 23 Env't. Rep. Cas. (BNA) 1982 (D.N.J. 1985); *Student Public Interest Research Group v. P.D. Oil & Chemical Storage, Inc.*, 627 F.Supp. 1074 (D.N.J. 1986).

(Memorandum, Randall Weiner, Walter Hang and Alison Kelly to NYPIRG Executive Committee re Clean Water Act Citizens Suits, July 19, 1986).

As noted earlier, it is very clear from the legislative history of the Act, that Congress was very concerned that the enforcement tool of the citizen suit be used to enforce the act by injuction and that it not be used for the recovery of personal profits. (See remarks of Sens. Boggs and Bayh, 118 Cong. Rec. 33715-16).

The provision in fact, however, has been used for private gain, a result inconsistent with congressional intent. Furthermore, although Congress' goal is clean water, plaintiffs have used citizens suits to "punish" pollutors for the sake of punishment.

Amici urge that the Congress never contemplated, and this court should not sanction, citizen actions such as the instant case, which are inherently purely punitive and at least sometimes prompted by the desire for personal profit, against plant operators who have already expended all time, money, diligence, and expertise necessary to develop and install state of the art technologies and so to accomplish long term compliance. Such defendants stand not as polluters, but as persons who are in obedience to the law and who have attained all the environmental benefits of compliance.

B. Punishment of the Public

A plant operator such as Gwaltney who has attained long term compliance with the act will have done so by the expenditure of incremental costs and expenses and of a portion of overhead costs. Consumers will be obligated to pay such costs through higher prices.

Similarly, civil penalties would likewise ultimately be paid for by the consumer. The addition of substantial civil penalties in punishment of a compliance achiever would therefore operate as punishment of the consuming public without any environmental benefit.

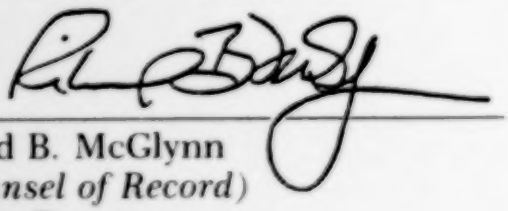
In enacting the Clean Water Act Congress was concerned with the accomplishment of environmental gain, not in punishing the public where no such gain results.

Amici urge that such a result be prohibited whether as a matter of statutory construction, or of sound judicial policy, or both.

Conclusion

For the foregoing reasons, *Amici* urge this Court to hold that district courts do not have jurisdiction under the Clean Water Act to apply civil penalties for wholly past permit violations under the Act.

Respectfully submitted,



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IN THE
SUPREME COURT OF THE UNITED STATES

No. 86-473 October Term, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner

v.

CHESAPEAKE BAY FOUNDATION, INC.
and
NATURAL RESOURCES DEFENSE COUNCIL,
Respondents

CERTIFICATE OF SERVICE

I, Richard B. McGlynn, Counsel of Record for *amici curiae* Mid-Atlantic Legal Foundation, et al., certify that on the 26th day of March, 1987, I caused to be served copies of the attached motion and brief on the following:

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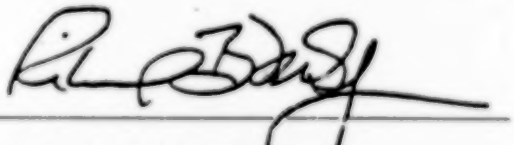

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No. 86-473

In the Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,
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Respondents.

Supreme Court, U.S.
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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, AMERICAN PETROLEUM INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION, AND AMERICAN PAPER INSTITUTE IN SUPPORT OF THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-473

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, AMERICAN PETROLEUM INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION, AND AMERICAN PAPER INSTITUTE IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

With written consent of the parties,[1] the Chamber of Commerce of the United States, American Petroleum Institute, Chemical Manufacturers Association, Synthetic

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[1] The consent letters have been filed with the Clerk of this Court.

Organic Chemical Manufacturers Association, and American Paper Institute respectfully submit the attached brief *amicus curiae* pursuant to Supreme Court Rule 36.2. *Amici curiae* are five major trade associations which represent a broad cross-section of American industry regulated under the Clean Water Act ("Act"), 33 U.S.C. §§ 1251-1376 (1982). *Amici* regularly represent their members' views in court on issues of national significance.

Amicus Chamber of Commerce of the United States ("Chamber") is the largest federation of business organizations and individuals in the United States. Its membership exceeds 184,000, including over 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. The Chamber's membership reflects the diversity of American industry and includes companies of all sizes and types.

Amicus American Petroleum Institute ("API") is a national trade association with a membership of over 200 corporations and 6,000 individuals who are engaged in all aspects of the petroleum industry, including exploration, production, refining and marketing.

Amicus Chemical Manufacturers Association ("CMA") is a non-profit trade association whose members produce more than ninety percent of this country's basic industrial chemicals.

Amicus Synthetic Organic Chemical Manufacturers Association ("SOCMA") is a non-profit trade association with more than 140 members, including many small companies. SOCMA's members produce a wide variety of organic chemicals, many of which are used as intermediates in the production of plastics and fibers, coatings, dyes, flavorings, pharmaceuticals and other products.

Amicus American Paper Institute ("API") is a national trade association of the pulp, paper and paper-

board manufacturing industry. The 175 member companies of API provide about ninety percent of all pulp, paper and paperboard manufactured in the United States.

The question before the Court in this case is whether Section 505 of the Clean Water Act, 33 U.S.C. § 1365, empowers citizens to sue companies that are in compliance with, but which had in the past violated, that Act. This question of statutory construction goes to the heart of how Congress intended the Clean Water Act to be enforced, and raises legal and practical issues of vital concern to each of the *amici* and to the regulated community in general.

The trade association *amici* are committed to the goals of the Clean Water Act and compliance with its requirements. They do not believe, however, that Congress ever intended citizen suits to be coextensive with the full panoply of enforcement powers which repose in governmental authorities. *Amici* are concerned, therefore, that the Fourth Circuit's construction of the statute has elevated the role of citizen suits well beyond what Congress intended when it enacted Section 505 of the Clean Water Act.

STATEMENT OF THE CASE

Section 505 allows citizens to commence civil actions against any person "who is alleged to be in violation of . . . an effluent standard or limitation under this Act." 33 U.S.C. § 1365(a)(1)(A). In the case below, the United States Court of Appeals for the Fourth Circuit held the operative words—"in violation of"—to include purely past violations that had ceased prior to commencement of the suit. *Chesapeake Bay Foundation, Inc.* v. *Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986). In so doing, the Fourth Circuit rejected the Fifth Circuit's decision in *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985), which construed the plain meaning of the words "in violation"

to mean that citizen suits can be initiated only to enforce the Act against a discharger whose violations are ongoing.

The Fourth Circuit's decision below raises important national issues concerning the scope of citizen suit enforcement under Section 505 of the Clean Water Act. Resolution of these issues requires an appreciation of how effluent limitations are established and enforced under the Clean Water Act.

A. Establishment Of NPDES Permit Limitations

Section 301 of the Clean Water Act, 33 U.S.C. § 1311, prohibits the discharge of pollutants to navigable waters except in compliance with a permit issued by the Environmental Protection Agency ("EPA") or an approved state under Section 402 of the Act, 33 U.S.C. § 1342. These permits, known as National Pollutant Discharge Elimination System ("NPDES") permits, contain specific limitations on the mass or concentration of pollutants that may be discharged.

Limits contained in NPDES permits are derived in two ways. They may be calculated from technology-based effluent limitations guidelines promulgated by EPA under Section 304 of the Act, 33 U.S.C. § 1314. Or, where guidelines have not been promulgated, permit limitations may be based upon the "best professional judgment" of permit writers as to the technologically achievable level of water pollution control.[2]

The promulgation of effluent limitations guidelines has been far more difficult than anyone, including Congress, expected. Congress required EPA to issue technology-based guidelines within one year of the adoption in 1972 of the Federal Water Pollution Control Act Amendments.

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[2] 33 U.S.C. § 1342(a)(1). NPDES permits may also contain water-quality based limits derived from state water quality standards. 33 U.S.C. § 1313.

33 U.S.C. § 1314(b). Since 1972, EPA has devoted significant effort to the development of effluent limitations guidelines but has been unable to complete that task,[3] for a number of reasons.

First, American industry is extraordinarily diverse and complex. Plants that produce the same product may use different raw materials or different processes. To comply with Section 304 of the Act, EPA must identify categories of industry that can reasonably be subjected to the same discharge limitations. Even then, EPA has found it necessary to divide plants into subcategories because of differences in the wastewater generated by different plants in a particular industry.

Second, when Congress adopted technology-based requirements in 1972, very little was known about the capability of various treatment technologies to treat the different types of wastewaters generated by industrial plants. Numerous treatment technologies were only in the planning or development stages; other were still only theoretical. Thus, the task of establishing precise, numerical effluent limitations that reliably can be achieved by the installation of wastewater treatment technology was—and remains—as much an art as a science.

To derive guidelines for a particular industry, EPA selects a "model" treatment technology, and then applies a statistical calculation to identify the level of pollution control achievable 95-99% of the time.[4] The guidelines do not represent a level of control achievable 100% of the time, even using the technology on which EPA relied.

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[3] *See Natural Resources Defense Council, Inc.* v. *Train*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976). *See also Natural Resources Defense Council, Inc.* v. *EPA*, 510 F.2d 692 (D.C. Cir. 1975).

[4] *See Marathon Oil Co.* v. *EPA*, 564 F.2d 1253, 1272-73 (9th Cir. 1977); *FMC Corp.* v. *Train*, 539 F.2d 973, 985 (4th Cir. 1976).

Once EPA establishes effluent limitations guidelines, translating them into enforceable permit limits is also a difficult task. Again, the complexity and variety of American industry, and the still developing science of wastewater treatment mean that the process is often an imprecise one.

When guidelines apply, a plant may not fit neatly into one subcategory, or even one category.[5] Complex manufacturing facilities often engage in operations that fall under more than one set of effluent limitations guidelines. For example, a plant may engage in the manufacture of both organic and inorganic chemicals, which are subject to different EPA guidelines, or a plant may engage in two processes that fall under different subcategories within a single guideline.

Where there are no applicable EPA guidelines, or there are guidelines for only part of a plant's operations, permit limitations must be established case-by-case. In these circumstances, a permit writer's professional judgment must be exercised to derive a set of limitations applicable to the wastestreams. The vast majority of NPDES permits contain limitations calculated on this basis. These "best professional judgment" permit limits are essentially educated guesses—both as to the levels of pollutant reduction that can be achieved after new treatment technology is installed and as to the date by which compliance with the limits can be achieved.

B. Achievement Of Permit Limitations

It is not surprising that permit limits often cannot be met or cannot be met within the time frame contem-

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[5] A discharger that is fundamentally different from the other plants in a category that were used to develop the limitations for the industry may apply for a "fundamentally different factors" variance, but they are rarely granted. *See Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985).

plated by the permit writer. A plant may install the technology on which the permit limits were based, but it still may be unable to meet the limits. In theory, the plant could seek a modification of its permit. However, permit-issuing authorities have been unable to keep up with the formidable task of issuing new and renewed permits, and there is a tremendous backlog of expired permits; timely permit modifications are seldom possible.

Plants seek to come into compliance with their permit limits in a number of ways. They seek to upgrade or fine tune their wastewater treatment systems, in an effort that can be time-consuming and costly. Steps may include pilot plant or laboratory studies and may result in use of different chemicals for treatment, revised timing of certain treatment steps, process modifications, or installation of additional treatment technology.

By this trial-and-error process, plants seek to come into compliance. It may take weeks, months, or several years before the right combination of steps is identified and implemented and compliance with permit limitations is achieved consistently. During this time, dischargers are often in regular contact with the permit-issuing authorities, *i.e.*, EPA or a state agency, advising them of actions the plant is taking. If these authorities believe that action is not being undertaken expeditiously or that enforcement is otherwise necessary, they may bring appropriate enforcement actions in state or federal court. If the permitting authority concludes that a company is taking appropriate steps to achieve compliance under the circumstances, it may exercise enforcement discretion not to bring suit.

C. Enforcement Of Permit Limitations

In addition to discharge limitations, NPDES permits contain conditions that require dischargers to monitor their effluent and to report the results to EPA or the state. Dischargers are required to sample for—and to

comply with limitations on—pollutants on either a daily, weekly or monthly basis. These samples are analyzed in accordance with EPA-approved analytical methods. The results of a discharger's analyses are reported to the permit-issuing authority on a regular basis in Discharge Monitoring Reports.

The discharger's self-reporting of permit exceedences is often sufficient to establish liability in enforcement actions.[6] It should be recalled, however, that permit limitations are *not* designed to be achievable 100% of the time, even under ideal conditions. As EPA has observed, "occasional, infrequent instances of noncompliance are statistically predictable at well-operated and maintained treatment facilities."[7] In recognition of this, EPA and state enforcement officials may exercise discretion on whether to bring an enforcement action (*e.g.*, where treatment is exemplary but statistically-expected violations occur). This necessary discretion is lost when citizen groups institute suits.

SUMMARY OF ARGUMENT

Section 505 of the Clean Water Act, 33 U.S.C. § 1365, should be construed in a manner that recognizes Congress' overriding concerns regarding the role of citizen participation in enforcement as well as the technical uncertainty inherent in setting permit limitations. Citizen

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[6] EPA's regulations identify two instances when exceedence of a permit limitation would not constitute a violation: instances of operational "upset," and "bypass" of the treatment system in certain circumstances. 40 C.F.R. §§ 122.41(m), (n). Other defenses might also be available in a particular case.

[7] EPA Document 440/1-83-007B, *Development Document for Proposed Effluent Limitations Guidelines and Standards for the Inorganic Chemical Point Source Category (Phase II)* (Oct. 1983), at 113. As EPA further explained: "Such high variations may be due to a variety of factors, such as short-term maladjustments in treatment facilities, variations in flow or pollutant load, or changes in the influent stream . . . ." *Id.*

participation is not an end unto itself; rather, in appropriate circumstances, it is a useful supplemental means to the end of preserving and enhancing the integrity of the nation's waters.

The citizen suit provision is designed to provide an additional means of compelling compliance with the requirements of the Clean Water Act. It provides a cause of action for citizen plaintiffs, and jurisdiction in the court, to abate ongoing violations by means of injunctive relief. The citizen suit provision is analogous to EPA's authority to issue compliance orders or to seek injunctive relief against a discharger who is "in violation."

The citizen suit provision is not intended as a mechanism for penalizing purely past violations. The imposition of penalties in a citizen suit is ancillary, and penalties are available in conjunction with injunctive relief only as "appropriate."

The government's ability to seek penalties is not so constrained, but the government exercises prosecutorial discretion, taking into account good faith remedial efforts and the fact that some exceedences are expected given the way permit limitations are established. Permit limitations are not established at levels achievable 100% of the time, and control technology often does not perform at 100% efficiency. Implementation of the Clean Water Act requires a certain amount of "give and take" between the regulators and the regulated community and may call for exercise of prosecutorial discretion by permit authorities where, notwithstanding installation of the requisite technology and model operation of the system, occasional exceedences of permit limitations inevitably occur. Allowing citizens to seek penalties for purely past violations which have since been remedied would not serve any abatement purpose and would discourage rather than encourage achievement of the goals of the Clean Water Act.

For just such reasons, Congress carefully circumscribed the availability of citizen suits. A citizen suit will lie

only where the discharger is "in violation" and then only "to enforce" the limitations of the permit. As the First Circuit concluded, "the words 'is . . . in violation' should be sufficiently liberally construed to comport with the injunctive purpose of the Act—conduct indicative of continuing or renewed violation justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one." *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F.2d 1089, 1093 (1st Cir. 1986). Such a "construction corresponds both with the statutory language and with the statutory purpose." *Id.* at 1094. It also harmonizes the Congressional purpose of authorizing citizen suits as a supplemental means of enforcing compliance with the practical realities of pollution control and the permitting system.

ARGUMENT

I. CITIZEN SUITS UNDER THE CLEAN WATER ACT ARE A SUPPLEMENTAL METHOD FOR ABATING ONGOING VIOLATIONS.

Congress placed primary responsibility for enforcement of the Clean Water Act with the Environmental Protection Agency and those states implementing the Act under authorized NPDES permit programs. Citizen suits serve purposes that are subordinate to primary enforcement by governmental agencies. They are meant to stimulate governmental activity and to provide an alternative, supplemental mechanism for forcing compliance if those government agencies do not act. *See Baughman* v. *Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979). As stated by the Court of Appeals for the Seventh Circuit in construing the citizen suit provision of the Clean Air Act: [8]

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[8] The citizen suit provision of the Clean Water Act is based upon the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7406(a) (1982). *See infra* at 14-15.

> Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief.

City of Highland Park v. *Train*, 519 F.2d 681, 690-91 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976). Therefore, Section 505 circumscribes the availability of citizen suits so that such suits serve to achieve abatement of illegal discharges, either indirectly by spurring compliance or federal or state enforcement action, or directly by the citizen suit.

A. The Language Of Section 505(a) Circumscribes The Availability Of Citizen Suits.

The citizen suit provision of the Clean Water Act sets forth with particularity the circumstances in which an action may be maintained by a citizen against a discharger. Section 505(a) of the Act permits any citizen to commence a civil action on his own behalf against any person "who is *alleged to be in violation of* . . . an effluent standard or limitation." 33 U.S.C. § 1365(a) (emphasis added). Section 505(f) defines "effluent standard or limitation" to mean, *inter alia*, "an effluent limitation or other limitation under section 301 or 302 of this Act" or an NPDES permit *"which is in effect."* 33 U.S.C. §§ 1365(f)(2), (6) (emphasis added).

The requirements of Section 505(a) and (f)—that a citizen suit plaintiff allege the discharger to be "in violation" of a permit limitation "which is in effect"—define the limited function of citizen suits to abate ongoing pollution.[9] As the First Circuit observed in *Pawtuxent Cove*, the statute speaks not in terms of taint, but in terms of

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[9] *See also* Section 505(h) (state may sue discharger in another state using the citizen suit provision if violation "is occurring" in another state and "is causing" effects in first state). 33 U.S.C. § 1365(h).

activity. "The clear import of section 505(a) is that citizens are empowered to seek injunctive relief against a polluter that 'is in violation' of the Act, and that in connection with such an action the district court is authorized to award 'any appropriate' civil penalties." 807 F.2d at 1092.[10] As explained by the Fifth Circuit in *Hamker*, 756 F.2d at 396:

> [T]he ordinary meaning of the words of the [Clean Water Act], the statute's structure and its prior Supreme Court interpretation indicate that section [505] does not authorize citizen suits seeking either injunctive relief or the imposition of civil penalties where the defendant is not alleged to be in violation of an effluent standard, limitation or order. The section "authorizes only prospective relief" even though "civil penalties . . . may be ordered by the court."

(citation omitted).

B. The Authority Conferred On Citizens Under Section 505 Is Not Coextensive With The Authority Of The Government Under Section 309.

The government is empowered by various sections of Section 309 of the Act, 33 U.S.C. § 1319, to enforce the Act in several ways: by issuing compliance orders, seeking injunctive relief, or seeking civil or criminal penalties.[11] Section 505 only partially parallels the government's authority.

Under Sections 309(c) and (d), the federal government may seek to recover penalties for violations at any

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[10] The Fourth Circuit's contrary conclusion—that the statute is sufficiently ambiguous that it must be read to mean a citizen action will lie to impose penalties against anyone who has *ever* violated the Act—discounts the distinction, as discussed below, between the language used in Section 505 and that used in Sections 309(c) and (d).

[11] The Water Quality Act of 1987, Pub. L. No. 100-4, 1987 U.S. Code Cong. & Ad. News (101 Stat.) 7, adds to Section 309 a provision for administrative penalty assessments.

time. These sections impose criminal and civil penalties upon any person who "violates" permit limitations, without reference to whether or not the violations are ongoing.[12]

A separate provision, Section 309(a), authorizes the government to issue compliance orders or to seek injunctive relief against dischargers who are "in violation" of effluent limitations or permits. This authorizes the government to act directly to abate ongoing violations, and differs on its face from Sections 309(c) and (d) which authorize penalties regardless of whether they are for past or present violations.

It is the Section 309(a) abatement provision to which the citizen suit provision, Section 505, is a counterpart. Section 505, like Section 309(a), is not a penalty provision aimed at general deterrence; rather, it provides a mechanism for compelling compliance with permit limitations by a discharger who is "in violation."[13] The citizen suit provision does not parallel the government's Section 309(c) and (d) authority to obtain penalties from a discharger who "violates" a permit at any time. Rather, Section 505 provides for penalties only as ancillary relief in a citizen suit to abate ongoing violations, and even then, only where "appropriate."

The Fourth Circuit cited the similarity in language between Section 505 and Section 309 without analyzing the significant differences between these provisions. It

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[12] The penalties are severe—up to $25,000 per day of each violation. 33 U.S.C. §§ 1319(c), (d), as amended by the Water Quality Act of 1987.

[13] The Senate Report accompanying S. 2770 made clear that the standard for federal enforcement under Section 309(a) and citizen suits under Section 505(a) "are the same," both being actions for "abatement." S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971) ("S. Rep."), *reprinted in* Senate Comm. On Environment And Public Works, 2 Legislative History Of The Federal Water Pollution Control Act Of 1972 (Comm. Print 1973) ("Leg. Hist."), at 1499.

thus incorrectly held that citizen and EPA enforcement powers are "co-extensive." *Gwaltney*, 791 F.2d at 310. In fact, the right of action conferred on citizens by Section 505 is only a secondary means for achieving compliance with the Clean Water Act. Actions under the citizen suit provision are limited by the terms of Section 505 to those actions that would secure the abatement of pollution.[14]

C. Penalties In Citizen Suits Are Ancillary To The Purpose Of Achieving Compliance.

The citizen suit provision of the Clean Water Act was modeled on the citizen suit section of the Clean Air Act, 42 U.S.C. § 7604, which focuses on "citizen suits against polluters *to abate violations*" of the Act.[15] The citizen suit provision of the Clean Air Act provides only for injunctive relief.

In enacting the Clean Water Act, Congress added to Section 505(a) the provision for the imposition of civil penalties in a citizen suit.[16] By adding this sanction, how-

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[14] Indeed, if a citizen suit results in abatement of a violation, the citizen plaintiffs may be entitled to costs and attorneys' fees even if a verdict is not reached in the suit. In discussing the authority of a court to award costs "whenever appropriate," the Senate Report on S. 2770 states that:

> This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

S. Rep. at 81; 2 Leg. Hist. at 1499.

[15] Summary of the Provisions of Conference Agreement on the Clean Air Act, *reprinted in* Senate Comm. On Public Works, 1 Legislative History Of The Clean Air Act Amendments Of 1970, 93d Cong., 2d Sess. (Comm. Print 1974), at 136 (emphasis added).

[16] The Senate Report explained:

> As in [the Clean Air Act] the provision in this bill is carefully restricted to actions where violations of standards and regula-

ever, Congress did not alter the thrust of the section, which is to abate ongoing pollution. The First Circuit notes:

> Alertness of concerned citizens . . . was of moment, but of secondary importance; even when, in enacting the Clean Water Act, Congress added penalties, such were to go to the government. There was no change in purpose. Rather, House and Senate Reports on the Clean Water Act characterize the addition of civil penalties as simply a modification of the citizen action for injunction authorized under the Clean Air Act.

Pawtuxet Cove, 807 F.2d at 1092-93.

Determination of whether injunctive relief is warranted is left to the court, applying the traditional, well-defined standards which govern the availability of injunctive relief. The imposition of penalties in a citizen suit is permitted only in conjunction with injunctive relief, and then only where "appropriate." [17]

"Appropriate," given the limitations on citizen suits discussed above, must mean that civil penalties are permissible under Section 505 only when they would serve to abate or prevent ongoing violations. Where there is no likelihood of future violations by a particular discharger, the imposition of penalties for past violations would not be "appropriate" and, therefore, is precluded by the plain language of Section 505.[18] The word "ap-

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> tions or a failure on the part of officials to act are alleged. One modification would allow the Courts to impose civil penalties provided as a result of actions brought by citizens.

S. Rep. at 792; 2 Leg. Hist. at 1497. *See also* H. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972) ("H.R. Rep."); 1 Leg. Hist. at 820.

[17] The dictum in *Pawtuxet Cove* that "[a] plaintiff who makes allegations warranting injunctive relief in good faith, judged objectively, may recover a penalty judgment for past violations even if the injunction proves unobtainable," 807 F.2d at 1094, is incorrect.

[18] Even in the case where injunctive relief is granted to abate ongoing violations, the court has discretion as to whether to assess

propriate" must be viewed as a constraint on the imposition of civil penalties in citizen suits, a constraint which does not appear in the provision authorizing civil penalties in suits brought by EPA under section 309.[19]

That citizen suits are authorized only to compel compliance is further indicated by the requirement of advance notice of a citizen suit to both the discharger and to the federal and state enforcement agencies.[20] 33 U.S.C. § 1365(b)(1)(A).

The alleged violator who receives notice is thus provided with an opportunity to bring its discharges into compliance. Should it do so, the purpose of the suit has been achieved, and the need for any litigation is obviated. Similarly, should the governmental entities receiving notice be prompted to initiate action to secure compliance,[21] the citizen suit is then precluded. The

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ancillary penalties and civil penalties may not serve any useful compliance purpose in a particular case.

[19] As noted above, Sections 309(c) and (d) impose criminal and civil penalties upon any person who "violates" the limitations of the Act, without reference to whether the discharger is currently "in violation" or whether penalties are "appropriate." The term "appropriate" in Section 505 cannot refer to the court's discretion to fix the amount of any penalty, because such discretion is inherent under either Section 309 or Section 505. As use of the term in Section 505 surely is not mere surplusage, it must refer to a constraint applicable to citizen suits but not government penalty actions.

[20] The court in *Hamker*, 756 F.2d at 396, explained:

> [T]he Act is structured to concentrate enforcement authority in the Administrator and the states, with supplementary power given to citizens under section [505(a)]. This supplementary power may be exercised only where neither the authorities nor the polluter acts to terminate the ongoing violation.

[21] The notice provision requires that the plaintiff give notice at least sixty days prior to the commencement of a civil action. The notice enhances the ability of the Administrator to "find[] that any person is in violation of any condition or limitation", a prerequi-

statute expressly precludes citizen action where the government is diligently prosecuting an action against a discharger "to require compliance with" the applicable requirement. 33 U.S.C. § 1365(b)(1)(B). As the House Report stated, no suit may be brought if "an abatement action is pending and is being diligently pursued in a United States or State Court." H.R. Rep. at 133; 1 Leg. Hist. at 820.

Each of these provisions evidences Congress' intent that a citizen suit be brought to secure present or prospective compliance with the requirements of the Act. This may be accomplished either through inducing voluntary compliance following receipt of a notice letter, spurring state or federal enforcement or, if necessary, by commencement of a separate citizen suit.

II. RECURRING VIOLATIONS ARE NECESSARY TO SUPPORT A CAUSE OF ACTION UNDER SECTION 505.

A. The Appropriate Test Is One That Looks To The Likelihood Of Continuing Violations.

In determining whether a citizen suit will lie under Section 505, the district court must look to whether the action is one for abatement, not just penalties. Under the statutory scheme and language discussed above, a citizen is not empowered to bring an action solely for the imposition of penalties relating to purely past violations; such an action is the prerogative of federal and state enforcement authorities in the exercise of their prosecutorial discretion. In citizen suits, the action must be brought against a discharger who is "in violation," "to enforce" the terms of the discharger's permit; penalties may be awarded as relief ancillary to an injunction, but only where appropriate, pursuant to Section 505(a).

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site to the issuance of an administrative compliance order or commencement of a civil action by the government to restrain that violation. 33 U.S.C. §§ 1319(a), (b).

As the action is one for abatement of pollution, the court must determine whether a defendant discharger is "in violation" by looking at whether there are ongoing violations susceptible of abatement. *Amici* submit that the First Circuit's construction in *Pawtuxet Cove* is particularly apt:

> We therefore think that the words 'is . . . in violation' should be sufficiently liberally construed to comport with the injunctive purpose of the Act—conduct indicative of continuing or renewed violation justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one. We find this possible in the fact that the statutory phrase is not the three words we have heretofore considered, but is 'is alleged to be in violation.' It is far less of a stretch to interpret these words as applicable to a present continuing intent than to take the *Gwaltney* court's encompassing a single past act . . . If a defendant's history of past violations is such that it is reasonable to believe that misconduct will continue, not only is it reasonable to allege a continuing violation, but this is precisely the showing that would induce a court to issue an injunction.

807 F.2d at 1093-94 (citation omitted).

Courts are well accustomed to engaging in this sort of "injunction analysis." The First Circuit had no difficulty articulating factors that would enter into the analysis:

> In reviewing action under this standard, the district court should consider, among other things, the isolated or recurrent nature of the infraction, the degree of scienter on the part of the defendant, and the sincerity of its assurances against future violations.

804 F.2d at 1094 (citation omitted).

The Fifth Circuit employed a similar analysis in *Hamker* when it upheld dismissal of a citizen suit where there were no allegations of ongoing violations or facts that

would warrant prospective relief. 756 F.2d at 396. The Fifth Circuit's analysis is consistent with the approach adopted by the First Circuit. In each instance, the court looked to whether the citizen action was one for abatement of pollution; in each instance, the court found it was not.

Hamker involved a one-time rupture of a pipeline. *Pawtuxet Cove* involved a defendant who had ceased discharging. A more difficult case is posed by a discharger with intermittent violations, but the analysis is still the same. By focusing on whether the violations are likely to recur and thus susceptible of prospective relief, the "construction corresponds both with the statutory language and with the statutory purpose." *Pawtuxet Cove*, 807 F.2d at 1094. As Judge Williams concurring in *Hamker* noted, the statutory requirement that the discharge be "in violation" should be read "to cover the chronic episodic violator or the violator who intentionally 'turns off the spigot' just before a citizen brings suit." 756 F.2d at 399.

B. Alternative Formulations Do Not Effectuate The Statutory Purpose.

Other tests for what the statute means by "in violation" have been proffered by the parties and by the court in *Gwaltney*, but these tests do not correlate well with accomplishing the Congressional goal of abating violations and do not accommodate the uncertain and sometimes "trial and error" nature of water pollution regulation and control.

First, a test that focuses solely on whether the discharger is in violation on the precise day the citizen suit is filed may not achieve fully the statutory purpose of abating ongoing violations. For example, a plant might experience an excursion on the day of the complaint not due to any inadequacy of treatment, but solely due to the statistical variability discussed *supra* at 5, 8. Random

excursions can be expected, particularly where the permit contains limitations on a great many substances. Such an isolated "violation" would not warrant injunctive relief. Conversely, a plant might have woefully inadequate treatment capability, but might be in compliance on the day suit was filed. Both circumstances suggest that a test premised upon the serendipity of filing is inadequate. In short, the statute's requirement for ongoing violations must be given a practical construction to carry out the intent of the citizen suit provision.

Second, application of Section 505 to reach dischargers who have *ever* been in violation on *any* day, as argued by citizen plaintiffs, also fails to serve the statutory purpose of abating violations. The citizen suit provision is a supplemental mechanism for achieving compliance; it is not intended to supplant the government's authority to seek penalties for past violations.

Occasional, random excursions in excess of permit limitations are predictable and by definition unavoidable. *See supra* at 5, 8. It is ongoing violations, not random excursions, that are addressed by the citizen suit provision. While penalties in governmental enforcement actions *theoretically* are available for every instance of violation, including such random excursions, in practice regulatory authorities temper their enforcement activities in light of the vagaries of technology and the good faith remedial efforts of permittees.[22]

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[22] In fact, EPA *relies* on the availability of enforcement discretion when it sets effluent limitations guidelines. For instance, in the preamble to final discharge rules for the pulp and paper industry, EPA acknowledged that certain limits would result in "three to four violations of daily maximum limitations every year . . ." simply because of the statistical method employed by the Agency to select these limits. Preamble, *Pulp, Paper, and Paperboard Point Source Category Effluent Limitations Guidelines And New Source Performance Standards*, 45 Fed. Reg. 52,017 (1982). But EPA concluded that because it could exercise enforcement discretion, the rules would not "adversely affect industry or subject industry to

If citizen suits were allowed free of the statutory constraints discussed above, they would undercut reasonable progress toward the clean up goals of the Clean Water Act. Dischargers subject to penalties in citizen suits for any violation will be disinclined to accept stringent permit limitations without lengthy adjudication. Achievement of stringent effluent limits likely depends upon perfect operation of treatment technology at the limits of its capability. Such performance is never achieved in practice. Accordingly, permit applicants will seek less stringent permit conditions through administrative and judicial means, thus lengthening the permitting process, decreasing the likelihood that stringent operating conditions will finally be imposed, and directing resources away from achieving the goals of the Clean Water Act.

In addition, subjecting dischargers to citizen suits for absolutely any past violation, since remedied, is also likely to discourage the installation of new treatment technology, because such technology may result in occasional exceedence of permit conditions until the "bugs" can be worked out. Instead, dischargers will act conservatively and select conventional treatment technology which—although it may work more consistently than innovative designs—will not advance the state-of-the-art of water pollution control.

C. The Allegation Of Ongoing Violations In A Citizen Suit Must Be Factually Supported To Establish Jurisdiction And The Plaintiff's Right To Relief.

In the court below, the United States argued (as *amicus curiae*) that a good faith allegation of ongoing violations is sufficient to confer jurisdiction, and subse-

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the real possibility of unnecessary enforcement action." *Id.* The Agency stated: "Although the Clean Water Act is a strict liability statute, the initiation of enforcement proceedings by EPA is discretionary. We have exercised and intend to exercise that discretion in a manner that recognizes and promotes good faith compliance efforts." *Id.*

quent proof of compliance should not divest the court of jurisdiction or result in dismissal.[23] The government's position is incorrect as a matter of law and would render the statutory provisions a nullity.

The requirement that a citizen suit be addressed to abatement of ongoing violations is both jurisdictional and substantive. When a discharger is in violation, *i.e.*, the facts show that violations are likely to recur unless enjoined, then Section 505 confers both jurisdiction on the court and a cause of action on the citizen to enforce the permit. Where such a case cannot be made, then the claim is subject to dismissal on jurisdictional grounds or on the merits.

Section 505 refers to the discharger being "alleged to be in violation." However, the word "alleged" should not be read to mean that jurisdiction or a claim is created by an unsupported allegation. Rather, allegations that violations are ongoing or likely to recur are subject to review for both facial and factual adequacy.

Subject matter jurisdiction may be challenged at any time, at the court's instance or pursuant to a Rule 12(b)(1) motion. Such a motion may attack the sufficiency of the complaint on its face, *e.g.*, when it does not even allege ongoing violations or the likelihood of recurrence. A motion under Fed. R. Civ. P. 12(b)(1) may also challenge the factual basis of subject matter jurisdiction, quite apart from the pleadings.[24] *See generally*

[23] Brief for the United States as *Amicus Curiae* Supporting Appellees at 21. The government argued that the "good faith" was demonstrated by the factual record, although it did not acknowledge that the sufficiency of the allegations is subject to factual challenge.

[24] In the court below, the United States contended that the reasonableness of the allegations was "subject to a number of safeguards (such as Rule 11 and attorneys' fees) to assure that they are not frivolous." Brief for the United States as *Amicus Curiae*, *supra* at 22. As discussed above, however, such "safeguards" have never supplanted a court's inquiry into the factual premises supporting subject matter jurisdiction.

Land v. *Dollar*, 330 U.S. 731, 735 n.4 (1947). The Court there noted that while a motion for failure to state a cause of action assumes the allegations of the complaint to be true, when an issue of jurisdiction is raised, "the court may inquire, by affidavits or otherwise, into facts as they exist." As no procedure is specified, the mode of determining jurisdiction is left to the trial court. The Third Circuit has elaborated:

> Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Mortensen v. *First Federal Savings & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) (footnote omitted). *See also Western Transportation Co.* v. *Coozens Warehouse & Distributors, Inc.*, 695 F.2d 1033, 1038 (7th Cir. 1982):

> We note that the district court may review any evidence submitted on the issue to determine if subject matter jurisdiction in fact exists. Moreover, the party alleging jurisdiction must support its allegation with competent proof of jurisdictional facts . . . The district court is not precluded from considering conflicting evidence which weighs on the jurisdictional determination.

The First Circuit in *Pawtuxet Cove* held that a citizen suit "may go forward if the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act." 807 F.2d at 1094.

The Court of Appeals likened this requirement to the amount in controversy for jurisdictional purposes, *i.e.*, a "reasonably held allegation" is sufficient to establish jurisdiction, and jurisdiction is not lost if subsequent inquiry reveals the allegation to have been incorrect. 807 F.2d at 1093.

The analogy to amount in controversy is a good one up to a point. Section 505 refers not to the actual existence of ongoing violations but to the allegation of them as being sufficient to confer jurisdiction. However, the jurisdiction allegations are not mere pleading requirements but must withstand facial and factual challenge. Even with respect to amount in controversy, the reasonableness of the allegation is subject to factual as well as facial challenge.[25]

Moreover, the analogy to amount in controversy is not complete because the requirement of ongoing violations is not only jurisdictional, it is also substantive. As discussed above, the requirement is an element of the plain-

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[25] As explained by this Court in *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 289 (1938):

> [I]f, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, *or if, from the proofs*, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed.

(emphasis added). *See also James* v. *Lusby*, 499 F.2d 488, 492-93 (D.C. Cir. 1974); *Giancana* v. *Johnson*, 335 F.2d 366, 368 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965); *Lichter* v. *Paine, Webber, Jackson & Curtis, Inc.*, 570 F. Supp. 533, 535-36 (N.D. Ill. 1983); *Russell* v. *Town of Mamaroneck*, 440 F. Supp. 607, 610-11 (S.D.N.Y. 1977); *Nixon* v. *Hampton*, 400 F. Supp. 881, 886-87 (E.D. Pa. 1975), *aff'd*, 535 F.2d 1247 (3d Cir. 1976); *Senate Select Comm. on Pres. Campaign Activities* v. *Nixon*, 366 F. Supp. 51, 59-60 (D.D.C. 1973).

tiff's cause of action. If the allegations or undisputed facts (or facts established at trial) demonstrate that there was no ongoing violation or reasonable likelihood of recurring violations at the time the suit was filed, then the case should be dismissed on the merits. Dismissal would be appropriate in these circumstances because such a suit is not one for the abatement of pollution, and thus there is no valid cause of action.[26]

As the statutory language and purpose indicate, citizen plaintiffs have a cause of action only to compel compliance and abate illegal discharges. If there is no reasonable possibility of ongoing violations to be abated, then there is no basis for injunctive relief or for the imposition of penalties as an ancillary remedy to affirmative relief to ensure future compliance.

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[26] The issues of jurisdiction and the plaintiff's cause of action should be distinguished from the granting of relief. In addressing either jurisdiction or whether the plaintiff has stated a claim, the court would look to the likelihood of recurring violations as of the time of the complaint. The court could consider post-filing events to the extent they bear on the existence of a continuing or recurring violation when the suit was commenced. The availability of injunctive relief, however, along with ancillary or "appropriate" civil penalties, would always be based upon all facts available to a court at the time an injunction is entered.

CONCLUSION

For the reasons stated above, *amici* respectfully urge this Court to reverse the decision below, and to hold that the Clean Water Act authorizes citizen suits only to abate ongoing violations.

Respectfully submitted,

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and

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICI CURIAE* OF CONSOLIDATED RAIL CORPORATION, CRUCIBLE MATERIALS CORPORATION, FERRO CORPORATION, JERSEY CENTRAL POWER & LIGHT COMPANY, MCDERMOTT INCORPORATED, MURPHY OIL USA, INC., PENNSYLVANIA ELECTRIC COMPANY, POWELL DUFFRYN TERMINALS, INC., SHELL OIL COMPANY, AND UNIVERSAL TOOL & STAMPING CO., INC. IN SUPPORT OF PETITIONER

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This brief *amici curiae* is submitted in support of petitioner Gwaltney of Smithfield, Ltd. *Amici* believe that

the decision below of the court of appeals, *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, incorrectly interprets section 505 of the Federal Water Pollution Control Act, 33 U.S.C. § 1365 ("the Clean Water Act" or "the Act"), as authorizing citizen suits seeking penalties for purely past violations of the Act.

The petitioner and respondents have consented to the filing of this brief. Their letters of consent have been filed with the Court.

STATEMENT OF INTEREST OF AMICI

Amici represent a broad spectrum of U.S. industry, including chemical production, oil exploration, production, refining and marketing, electric utilities, railroad freight transportation, production of steel and other metal products, ocean tanker terminals, and tool manufacturing. Like petitioner, each of the *amici* holds one or more permits issued under the National Pollutant Discharge Elimination System ("NPDES") established by section 402 of the Clean Water Act, 33 U.S.C. § 1342. These permits regulate the discharge of pollutants to navigable waters.[1]

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[1] The 1972 amendments to the Act required the establishment on an industry by industry basis of generally applicable effluent limitations that restrict the types, quantities and concentrations of pollutants that may be discharged. These effluent limitations are enforced through individual NPDES permits which transform the generally applicable effluent limitations into obligations of a discharger. *See Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 203-08 (1976). Each such permit limitation or standard is referred to as a "parameter" (*e.g.*, specific limits for chemicals, metals, heat, etc., contained in the discharge). Section 308 of the Act, 33 U.S.C. § 1318, requires the permittee to monitor each parameter at a specified interval. Monitoring reports are submitted to the appropriate regional office of the U.S. Environmental Protection Agency and the state environmental protection office, who use the reports in evaluating compliance and determining whether enforcement action is necessary. In addition, all monitoring reports are available to the public.

On a composite basis *amici* hold 97 NPDES permits for facilities in 23 states.

Amici are committed to the goals of the Clean Water Act. To that end, and in coordination with state and federal regulatory authorities, *amici* have spent more than $156 million during the past five years to upgrade and enhance water pollution control at these facilities. Nevertheless, each *amici* is either a current defendant in one or more citizen enforcement suits under section 505 of the Clean Water Act, a defendant in a recently concluded suit under section 505 or has received notice, pursuant to section 505(b)(1)(A), that an environmental organization intends to file such a suit. A number of these actions involve the issue presently before the Court —whether section 505 authorizes suits to impose penalties for purely past violations of the subject facility's NPDES permit. The decision below, therefore, directly affects *amici* and raises fundamental questions regarding the role Congress intended for citizen suits under section 505.

SUMMARY OF ARGUMENT

Section 505's purpose is abatement of ongoing violations of the Clean Water Act. The statute authorizes a citizen suit against a person "alleged to be in violation" of its obligations under the Act, and where it is shown that a person is in violation, unlawful conduct may be enjoined and a civil penalty imposed. Conversely, a suit may not be brought under section 505 to impose punishment for purely past violations.

The terms of section 505 and its legislative history confirm this interpretation. They repeatedly focus on the present tense, that is, persons who are currently violating the Act and for whom an order requiring compliance is necessary. Similarly, section 505's legislative history emphasizes that abatement is the intended purpose of a citizen suit. On the other hand, neither the statute nor

its legislative history support the view of the court of appeals below that a citizen suit may be brought solely to impose civil penalties for previously abated violations. In reaching that conclusion the court disregarded contrary legislative history. Instead, the court made a superficial comparison of section 505 to section 309, 33 U.S.C. by 1319, the Act's provision authorizing government enforcement. The court reasoned that under section 309 the federal government may sue for penalties for purely past violations and citizens should have the same authority. That reasoning is flawed. Section 505 does not duplicate government enforcement and looks to the future rather than to matters that are over and done with. This reflects the fact that the object of section 505, like the policy underlying the Clean Water Act, is abatement of ongoing pollution.

ARGUMENT

A. Section 505 Does Not Authorize Citizen Suits To Impose Penalties For Past, Nonrecurring Violations

The court of appeals ruled that section 505(a) authorizes citizen suits for NPDES permit violations committed entirely in the past. By the court of appeals' own admission, its interpretation is "expansive." 791 F.2d at 311-12. The court's position is also contrary to the other circuits that have addressed the same issue.

The court of appeals approached this statutory interpretation issue in terms of establishing the court's view of a reasonable policy for citizen suits, *id.* at 309-11, rather than discerning Congress' intent regarding the role of citizen suits under section 505. Congress, however, did not intend section 505 to duplicate government enforcement or as punishment for past violations, in the form of civil penalties, without a current environmental compliance benefit. The court of appeals' decision disregards that intent and the decision's impact is severe. Persons who achieve permit compliance before the filing

of a suit under section 505 remain subject to citizen suits for substantial civil penalties. That extends citizen suits beyond the purpose Congress specified in the Clean Water Act. The result will be unnecessary litigation without benefit to the environment.

1. Section 505(a) of the Clean Water Act authorizes a citizen suit against a person "alleged to be in violation" of its obligations under the Act. The statute focuses on abatement of ongoing violations, that is, persons who are "in violation" of an effluent standard or limitation for whom an order "to require compliance" is necessary. *See* §§ 505(a) and (b); *International Paper Co. v. Ouellette*, 107 S.Ct. 805, 815 n.18 (1987) (where a person "is violating the terms of its permit," a citizen may sue under section 505 "to compel compliance"). Similarly, the "in violation" proviso is the condition precedent both to an order to enforce an effluent standard or limitation *and* the payment of a civil penalty.

This language clearly demonstrates section 505's purpose as an injunction statute for abatement of ongoing violations. It was "expressly modeled" after the citizen suit provision in section 304 of the Clean Air Act, 42 U.S.C. § 7604. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 17 n.27 (1981). Like section 505(a), section 304(a) of the Clean Air Act authorizes injunctive relief against persons "alleged to be in violation" of statutory obligations. Under each of the statutes the court can issue an enforcement order or injunction. Under section 505(a), the court may supplement its injunction order with civil penalties ("the district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation . . . and to apply any appropriate civil penalties"). Thus, although section 505 adds civil penalties to the injunctive relief available under section 304, section 505 reflects no change in purpose from section 304. *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1092-93 (1st Cir. 1986).

The court of appeals, however, dismissed section 304 of the Clean Air Act as irrelevant to interpretation of section 505. In a brief footnote the court of appeals suggested that the Clean Air Act and its legislative history are completely inapposite here because section 304 permits only injunction suits. 791 F.2d at 311 n.12. That reasoning contradicts this Court's recognition that section 505 was expressly modeled after section 304, and ignores section 505's legislative history, which states that section 505 is "carefully restricted" to the same types of actions as section 304. *See* S. Rep. No. 414, 92d Cong., 1st Sess. 79 (1971), *reprinted in* 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972* ("CWA Leg. Hist.") 1497 (1973).[2] Specifically, both statutes authorize abatement actions, that is, actions to terminate ongoing violations. "Successful abatement" is the intended "result of a citizen proceeding." S. Rep. No. 414, *supra* at 81, 2 CWA Leg. Hist. at 1499.[3]

The court of appeals dismissed this legislative history as insignificant, observing that such statements do not show that abatement is section 505's only purpose. 791 F.2d at 311. That once again disregards the fact that the legislative history of section 304 of the Clean Air Act, which is solely an injunction statute, is identical to the legislative history of section 505 of the Clean Water Act. *See* S. Rep. No. 1196, 91st Cong., 2d Sess. 37 (1970), *reprinted in* 1 *A Legislative History of the Clean Air Act Amendments of 1970* ("CAA Leg. Hist.")

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[2] *See also* H.R. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972), 1 CWA Leg. Hist. at 820 (section 505 "closely follows" the concepts of section 304 but adds civil penalties as well as injunctive relief).

[3] *See also* H.R. Rep. No. 911, *supra* at 133, 2 CWA Leg. Hist. at 820 (suits under section 505 are abatement actions). Similarly, a citizen suit may be brought "to abate a violation" of the Act and to "seek compliance." *Water Pollution Control Legislation: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 1st Sess. 109, 114 (1971).

437 (1974) (under section 304, if government does not initiate "abatement proceedings . . . , the citizen might choose to file the action").[4] If section 505 had been intended to authorize, in addition to abatement actions, suits to impose penalties for purely past violations, then surely such a distinction between sections 304 and 505 would be clear in the latter provision's language and legislative history. Instead, the legislative history underlying each of the two statutes uses the following identical statement to describe them:

> The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances[,] the courts should award costs of litigation to such party. This should extend to plaintiffs in actions *which result in such successful abatement* but do not reach a verdict. For instance, *if as a result* of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions [emphasis supplied].

S. Rep. No. 414, *supra* at 81, 2 CWA Leg. Hist. at 1499; 116 Cong. Rec. 32927 (1970) (Sen. Muskie), 1 CAA Leg. Hist. at 136.

In Congress' words, the fundamental object of a citizen suit under either the Clean Water Act or the Clean Air Act is to bring about "a result"—abatement of ongoing violations—and the court of appeals erred in ascribing significantly different meanings to these parallel statutes. Had Congress intended to authorize suits under section 505 solely to impose penalties, then Congress would not have repeatedly described sections 304 and 505 as authorizing the same type of abatement actions. This legislative history provides sound evidence that Congress

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[4] *See also* H.R. Rep. No. 1783, 91st Cong., 2d Sess. 55 (1970), 1 CAA Leg. Hist. 205 (citizen suits are authorized to seek abatement of violations).

did not intend that section 505 suits would be filed to collect civil penalties for violations that had abated prior to suit.[5]

2. The court of appeals minimized the importance of section 505's emphasis on current, ongoing violations, as well as the legislative history showing the statute's purpose as a mechanism for seeking abatement of such violations. Instead, the court focused on section 309 of the Clean Water Act, 33 U.S.C. § 1319, which authorizes government enforcement, and compared that provision to section 505. The court found the language of the two provisions similar and concluded that the federal government has authority under section 309 to seek penalties for purely past violations. With those premises, the court concluded that citizens should have equivalent enforcement authority. The court's reasoning is flawed.

First, the Act specifies significantly different enforcement roles for the government and private plaintiffs. Section 309 places primary responsibility for Clean Water Act enforcement with the federal government and

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[5] *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (because substantive provisions of Age Discrimination in Employment Act were derived *in haec verba* from equal employment opportunity sections of Civil Rights Act of 1964, interpretation of Civil Rights Act applies with equal force in context of age discrimination). *See also* 2A C. Sands, *Sutherland on Statutory Construction* § 53.01 at 549 (4th ed. 1973).

Respondents subordinate this legislative history to a written statement by Senator Muskie that a citizen suit may be brought against one "alleged to be, or to have been, in violation." 118 Cong. Rec. 33700 (1972), 1 CWA Leg. Hist. at 179. As petitioner's brief explains (pp. 28-29), that statement was not considered by other legislators. Moreover, an isolated statement of a single legislator, albeit a sponsor of the legislation, is not controlling in analyzing legislative history. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980). It must be considered together with the other legislative history, *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), which in this case refutes the court of appeals' interpretation.

states having adequate authority under their own laws to enforce the Act. In comparison to government's "central" enforcement responsibility, the role of citizen suits is of a "limited nature" that only "supplement[s]" government. *Middlesex County*, 453 U.S. at 13-14, 17 n.27. In other words, contrary to the court of appeals, section 505 "does not permit the citizen to *duplicate* the [government's enforcement] powers." *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 395 (5th Cir. 1985). For that reason, section 505 does not authorize suits for purely past violations of the Act. *Id.*; *see also City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1014 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980).

The limited role intended for citizen enforcement is corroborated by the sixty-day notice requirement in section 505(b). A citizen suit is barred where, in response to a section 505(b) notice, the government brings an action "to require compliance." As explained in *Hamker v. Diamond Shamrock*, 756 F.2d at 396:

> [I]t is most reasonable to read the [§ 505(b)] requirement that notice also be given to the alleged violator as an indication that where the violator responds to the notice by bringing himself into compliance, the citizen loses the right to bring suit under 1365(a) [§ 505(a)], just as he loses the right to commence an action where the Administrator [of the EPA] or the state responds by diligently prosecuting an action against the alleged violation . . . [citations omitted].

The court of appeals' contrary position also fails to recognize important differences in the language of sections 309 and 505. As indicated above, in section 505 "there is no retreat from the present tense." *Pawtuxet Cove*, 807 F.2d at 1092. Consistent with the statute's focus on the present, it is directed against a person who is "in violation" and for whom an order "to require

compliance" is necessary. *See* §§ 505(a) and (b). Moreover, "in violation" is a prerequisite both to enforcement orders and civil penalty relief. Similarly, a condition precedent to a section 505 suit is that the plaintiff give notice "to the state in which the alleged violation *occurs*," and the plaintiff must be a person whose interest "*is or may be* adversely affected." *See* §§ 505(b)(1)(A)(ii) and 505(g) (emphasis supplied).

In contrast, in section 309 the term "in violation" is confined to subsection 309(a). That provision authorizes administrative compliance orders based on a finding that the permittee is "in violation" of an effluent limitation, etc., and prior issuance of such a finding under subsection 309(a) is also the predicate for a civil action by the government under subsection 309(b). But the "in violation" provision is otherwise absent from section 309.[6] Thus, assuming that section 309 authorizes a government-initiated civil penalty suit for purely past violations, the significant differences between that provision and section 505 demonstrate that the latter limits citizen suit jurisdiction to ongoing violations.

In short, the court of appeals' decision contradicts the terms of section 505 and its underlying policy. Congress did not establish section 505 to duplicate government enforcement or to impose punishment, without any current compliance benefit, on persons who failed to comply fully in the past. For that reason, section 505 looks to the future, rather than to matters that are over and done with. This reflects the fact that the object of section 505, like the policy of the Clean Water Act, is abatement of pollution.

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[6] Unlike § 505(a)'s "in violation" condition precedent to civil penalties in a citizen suit, section 309 authorizes civil penalties against anyone who "violates" the Act or a previously issued administrative order under § 309(a).

B. Jurisdiction Under Section 505 Requires A Showing That Violations Are Ongoing, And Jurisdiction Is Not Established Merely On The Basis Of An Allegation That Continuing Violations Are Likely

Noting that subsection 505(a) confers jurisdiction where a person is "alleged to be in violation," the court of appeals implied that a possible alternative basis for decision here is that the respondents' complaint alleged in good faith that petitioner's violations would continue. But the court ruled that section 505 jurisdiction extends to purely past violations, making it unnecessary to consider the question of continuing violations. 791 F.2d at 308 n.9.

The First Circuit's recent *Pawtuxet Cove* decision is in part similar to that aspect of the decision below. On the one hand, the First Circuit agreed with the Fifth Circuit (*Hamker v. Diamond Shamrock*) that section 505 does not extend to purely past violations. 807 F.2d at 1092-94. The First Circuit also held, however, that section 505 confers jurisdiction in cases of likely continuing violations that require injunctive relief, and added that even though injunctive relief may later be denied (because violations had abated), penalties could be imposed where jurisdiction attached based on good faith allegations of the need for an injunction. *Id.* at 1094. The First Circuit described its interpretation as somewhat liberal, but necessary because "even a persistent violator may, temporarily, 'clean up his act.'" *See id.* at 1093.

That concern, the persistent violator who is in compliance temporarily, is not implicated in this case, as explained in petitioner's brief (at pp. 19-21, 41-42). Furthermore, the mere good faith allegation of an ongoing or continuing violation of the Clean Water Act is insufficient to support injunctive relief or the imposition of civil penalties. The First Circuit's contrary suggestion is based on the fact that section 505(a) refers to a person who is "*alleged to be* in violation [emphasis sup-

plied]." 807 F.2d at 1093. Congress, however, expressly modeled section 505, including the quoted phrase, after section 304 of the Clean Air Act. Section 304 limits relief to injunctions, which may not be granted merely on the basis of past unlawful actions. *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). The First Circuit's liberal interpretation of "alleged to be in violation" was not, therefore, Congress' intent when it crafted that language for section 304 or incorporated it into section 505.

Moreover, the First Circuit's analogy between the "alleged to be in violation" proviso and the amount in controversy in diversity cases is misplaced. The rationale underlying the amount in controversy rule is that a preliminary jurisdictional determination regarding damages should not deny the plaintiff in a diversity case a federal court trial of its claim. *Deutsch v. Hewes Street Realty Corp.*, 359 F.2d 96, 99 (2d Cir. 1966). That rationale does not apply to a suit under section 505 and is not justification for conferring jurisdiction based on a party's pleading.

In any event, if section 505's "in violation" prerequisite can be satisfied by a good faith allegation that continuing violations are likely, such allegations, and the inquiry on which they are based, must be evaluated against an objective standard. That standard must recognize section 505's fundamental purpose—abatement of ongoing violations, rather than imposition of civil penalties (and awards of attorneys' fees) as punishment for "matters over and apparently done with." *Pawtuxet Cove*, 807 F.2d at 1093; *Hamker v. Diamond Shamrock*, 756 F.2d at 396. *See* also Fed. R. Civ. P. 11.[7]

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[7] The plaintiff's inquiry should not be limited to a review of the periodic (quarterly) monitoring reports required under § 308 of the Act, *see* n.1, *supra*, which may not reflect current compliance status. Rather, the citizen plaintiff must inform itself regarding the defendant's compliance history, recent improvements in wastewater treatment facilities and compliance status up to commencement of the suit. As *Pawtuxet Cove* suggests, 807 F.2d at 1094, in evaluat-

Furthermore, many industrial facilities have several discharge points and at each discharge a number of regulated parameters. *See* n.1, *supra*. An allegation of continuing violations based on recent noncompliance with one of those parameters should not allow a plaintiff to revive past, previously abated noncompliance of unrelated parameters. *Sierra Club v. Kerr-McGee Corp.*, 23 Env't Rep. Cas. (BNA) 1685, 1690 (W.D. La. 1985). Put another way, a series of temperature violations during the winter of 1987 does not allow a citizen to resurrect unrelated violations in 1983 which had previously abated. To hold otherwise would be inconsistent with the role of citizen suits, which may be brought to address only specific violations and conduct indicative of continuing or renewed violations justifying an injunction. *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985); *Pawtuxet Cove*, 807 F.2d at 1093. This view is also consistent with section 309(d) of the Act which subjects each separate violation to the statutory maximum penalty of $25,000 per day. *See* § 313 of the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7, 45.

In short, a citizen suit cannot revive previously abated violations. That is because section 505's object, like the policy of the Clean Water Act, is achieving compliance and section 505 looks to the future rather than to matters over and done with.

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ing a plaintiff's allegations the district court should consider, among other things, the willfulness of violations, the sincerity of the defendant's assurances against future violations, and the isolated or recurrent nature of the violations (isolated NPDES violations are expected at any facility, *Marathon Oil Co. v. Environmental Protection Agency*, 564 F.2d 1253, 1272-73 (9th Cir. 1977)).

The criteria outlined above do not impose an undue burden on the plaintiff. In response to the standardized letter that environmental organizations frequently use to give the sixty days notice required by § 505(b)(1)(A) the would-be defendant quite often provides considerable information, such as that identified above, regarding compliance status.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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No. 86-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner

—v.—

CHESAPEAKE BAY FOUNDATION, INC.
and
NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* BETHLEHEM STEEL CORPORATION, ACME STEEL COMPANY, ARMCO INCORPORATED, INLAND STEEL COMPANY, LTV STEEL COMPANY, INC., USX CORPORATION, AND AMERICAN IRON AND STEEL INSTITUTE IN SUPPORT OF PETITIONER

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Pursuant to Rule 36.2 of the Rules of this Court, Bethlehem Steel Corporation, Acme Steel Company, Armco Incorporated, Inland Steel Company, LTV Steel Company, Inc., USX Corporation, and American Iron and Steel Institute submit this brief as *amici curiae* in support of the Peti-

tioner, Gwaltney of Smithfield, Ltd. ("Gwaltney"). All parties to this case have consented to the filing of this brief, as evidenced by letters of consent filed with the Clerk of this Court.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Bethlehem Steel Corporation ("Bethlehem"), Acme Steel Company ("Acme"), Armco Incorporated, Inland Steel Company, LTV Steel Company, Inc., ("LTV Steel"), and USX Corporation are engaged in the manufacture of iron and steel. Each holds one or more National Pollutant Discharge Elimination System ("NPDES") permits issued pursuant to the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq., also known as the Clean Water Act ("the Act").[1] All but Acme and LTV Steel have been defendants in at least one citizen suit under section 505 of the Act, 33 U.S.C. § 1365.

Amicus American Iron and Steel Institute ("AISI") is a trade organization composed of manufacturers, processors, and other producers of iron and steel and related products, including all corporate *amici*. Virtually every member of AISI is subject to regulation under the Clean Water Act, and many of them also have been defendants in citizen suits. AISI presents the views of its members on legal issues and issues of public policy which are of concern to its members.

Amici support the proposition urged by Gwaltney that the Clean Water Act does not authorize private citizens to sue for civil penalties for purely past violations of the Act. The

1. All citations to the Act herein incorporate relevant amendments under the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987), unless otherwise noted.

question we brief is of much broader scope and concern, however. *Amici* believe that this case raises important issues concerning the constitutionality of the Clean Water Act citizen suit provision and the fair, effective enforcement of the Act. *Amici* submit that the Clean Water Act's grant to private citizens of a license to prosecute actions on behalf of the government violates Article II of the Constitution. This unconstitutional statutory scheme has resulted in unjust, inconsistent, and improper execution of the Act.

SUMMARY OF THE ARGUMENT

As interpreted by many federal district courts and by the district and circuit courts in this case, section 505 of the Clean Water Act authorizes "any citizen" to bring a civil action in federal court to enforce any standards, limitations, or orders promulgated under the Act—essentially displacing the system of governmental enforcement created by Congress in the Act's other provisions. The citizen plaintiffs, most of whom are environmental interest organizations suing in a representative and corporate capacity, are not subject to the restraints on governmental enforcement.[2] But in every citizen suit seeking civil penalties for alleged violation of the Clean Water Act, the exclusive interest advanced is that of the government, not the citizen plaintiffs.

The citizen suit provision of the Clean Water Act thus unconstitutionally vests power to enforce the law in persons who are not duly appointed Officers of the United States. Citizen plaintiffs are permitted to bring enforcement actions as to which they have no personal stake in the outcome, to vindicate only the government's interest, without any accountability to the President or other Officer of the

2. For an extensive review of the use that these organizations have made of the Clean Water Act citizen suit provision and the abuse that may have resulted, the Court is respectfully referred to the *Amicus Curiae* brief of the Connecticut Business and Industry Association filed in support of the Petition for Writ of Certiorari in this case. *Amici* expressly adopt the arguments set forth therein.

United States appointed pursuant to Article II. In a complex regulatory scheme such as the Clean Water Act, the national goals of uniform, fair and effective enforcement of the law are undermined by permitting private persons with no executive authority or responsibility to usurp and disrupt the execution of the law by the Executive Branch.

If this Court rules in favor of Gwaltney it may not be necessary to reach the constitutional issue briefed herein. We urge the Court, nevertheless, to consider the serious constitutional implications of reading the Clean Water Act to permit private citizens to sue for civil penalties payable to the Treasury.

I. Only the Government's Interest Is Involved in a Citizen Suit for Civil Penalties under Section 505 of the Clean Water Act.

The Federal Water Pollution Control Act (Clean Water Act) created a two-tiered, federal-state partnership to achieve the statutory objective of restoring and maintaining the quality of the nation's waters. The United States Environmental Protection Agency ("EPA" or "the Agency") plays the lead role in this partnership, with primary responsibility for: (1) collecting, generating, and disseminating information, §§ 1314(a), (c), (d), (f), (j), and 1342(p), *inter alia;* (2) establishing and approving guidelines and standards, §§ 1311, 1312, 1313(b), 1314(b), (f)-(i), 1317, 1342(p), 1345(d); (3) applying established guidelines and engineering judgment in issuing and reviewing permits, and granting certain variances from established standards, §§ 1311(g), (h), (n), 1342(a), (d)-(f); and (4) monitoring and enforcing compliance, §§ 1319, 1342(h), (i). A number of options are available to EPA when it determines that enforcement is appropriate, including administrative abatement and compliance orders, § 1319(a); administrative penalties, § 1319(g), civil actions for injunctive relief or civil penalties, or both, § 1319(b), (d); and criminal enforcement, § 1319(c). See also § 1319(f).

States also have important responsibilities under the Act. They establish and revise water quality standards, with the approval of EPA, § 1313(a), (c); identify special water quality problems, their sources, and control strategies, §§ 1313(d), 1314(l); implement continuous water quality planning, § 1313(e); and consult with EPA on numerous issues arising under the Act. States also may develop approved programs under which they issue and enforce discharge permits, subject to EPA's right to enforce where a state declines to do so after notice, or in the event of a state's widespread failure to enforce. §§ 1319(a), 1342(b)-(c), 40 C.F.R. Part 123. State enforcement options must be similar to EPA's in order for a state to obtain program approval. § 1342(b)(7).

The Clean Water Act thus establishes a complex scheme in which EPA and the states play complementary roles. Individual states exercise a fair degree of autonomy, while EPA ensures nationwide consistency in implementation of the Act through its policy-making, standard-setting, and oversight activities, as well as its ultimate enforcement authority. It is EPA's ability to coordinate the execution of the Act which makes uniform, fair, and effective enforcement possible.

Nothing about the Clean Water Act as described thus far is constitutionally objectionable. What makes the Act offensive to the Constitution is its provision for parallel, yet completely separate and distinct, enforcement by private citizens. Under section 505 of the Act, citizens who allege that they meet minimal standing requirements[3] may seek

3. Bald allegations of harm to one's aesthetic sensibility or recreational interest are sufficient to establish standing to sue. *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Sierra Club v. SCM Corp.*, 747 F.2d 99 (2d Cir. 1984); *Sierra Club v. Simkins Indus.*, 617 F. Supp. 1120, 1131 (D. Md. 1985). For a discussion of the particular importance of standing as a safeguard against the usurpation of the executive function, see Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 894-97 (1983).

enforcement of a perceived violation of the Act in a federal district court, without regard to or, in many cases, despite EPA's or a state's determination that enforcement is not warranted. As interpreted by a number of lower courts, the Act authorizes any citizen to bring an enforcement action in federal court, without having an interest in the outcome of the suit which is distinguishable from the interest of any other citizens or the government itself.

Under section 505(a)(1), any citizen may bring a civil action in a federal district court against

> any person who is alleged to be in violation of (A) an effluent standard or limitation . . . or (B) an order issued by the Administrator [of EPA] or a State with respect to such a standard or limitation . . . .

33 U.S.C. § 1365(a)(1). Prior to bringing such an action, a citizen must provide EPA, the appropriate state agency and the alleged vio' 'or sixty days' written notice of the citizen's intention to file suit. § 1365 (b)(1)(A). While EPA may intervene in the suit as a matter of right, there is no requirement that it do so. § 1365(c)(2). If a citizen complies with the Act's sixty-day notice provision, and no administrative action was previously commenced or administrative penalty paid under section 309(g) of the Act, there is no statutory bar to a citizen suit unless, *prior to* the filing of the citizen's complaint, EPA or the state "has commenced and is diligently prosecuting" a separate civil or criminal action to require compliance. § 1365(b)(1)(B). Once the statutory conditions to filing a citizen suit complaint have been met, the district court is required to take jurisdiction. If a violation of the Act is proved, the district court is to determine whether "to apply any appropriate civil penalties," § 1365(a), of up to

$25,000 per day[4] for each violation under section 309(c) and (d) of the Act, 33 U.S.C. § 1319(c), (d).[5]

When Congress authorized private citizens to seek and district courts to award civil penalties, it also clearly indicated that citizen plaintiffs were not to derive any monetary benefit from a successful citizen suit. The Senate Report that accompanied the Clean Water Act is explicit on this point: "any penalties imposed would . . . not be recovered by the complainant."[6] In holding that the Clean Water Act did not create a private cause of action for damages, this Court noted that any civil penalties awarded in a citizen suit would have to be paid to the federal treasury as miscellaneous receipts. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 14 n.25 (1981). Having no right to moneys payable to the Treasury, citizen suit plaintiffs have no more interest in a civil penalty than any other citizen.[7] The funds, once paid, belong exclusively to the government. Congress intended that the exclusive bene-

4. Prior to the enactment of the Water Quality Act of 1987 the maximum penalty was $10,000 per day of violation.

5. In *Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200, 1208 (4th Cir. 1986), the court found that the language of § 309(d) "leaves little doubt that, under the circumstances of [that] case, a penalty in some form is mandated."

6. S. Rep. No. 414, 92d Cong., 1st Sess. 79, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3745, *and in* EPA, *Legal Compilation (Water)*, Supp. 1, vol. 1, at 90, 168 (1973). The House Committee on Public Works stated similarly that "[t]he penalties imposed would be deposited as miscellaneous receipts in the treasury and not be recovered by the citizen bringing the suit." H.R. Rep. No. 911, 92d Cong., 2d Sess. 133, *reprinted in* EPA, *Legal Compilation (Water)*, Supp. 1, vol. 1, at 205, 337 (1973).

7. This Brief addresses only the constitutional infirmity of citizen suits for civil penalties payable to the Treasury. The question whether injunctive relief could be sought in citizen suits without running afoul of the constitutional principles implicated by suits for civil penalties is not before the Court. Respondents Chesapeake Bay Foundation, Inc. and Natural Resources Defense Council, Inc. have alleged no facts that would entitle them to injunctive relief.

ficiary of civil penalties awarded in a Clean Water Act case would be the government.

Reduced to its essence, section 505 is an open invitation to any citizen to assume the mantle of government for the purpose of enforcing the Act.[8] This violates the fundamental constitutional principle that the determination whether and by what means the law will be enforced is exclusively within the executive authority of the President.[9] To ensure, *inter alia*, accountability and consistency in the execution of the laws, the Framers vested "the executive Power . . . of the United States" in the President. U.S. Const. art. II, § 1, cl. 1. *Amici* respectfully assert that Congress exceeded its constitutional powers when it granted citizens the purported right to bring enforcement actions under section 505 for civil penalties payable solely to the federal treasury.[10]

II. Citizens Bringing Enforcement Actions under the Clean Water Act Purport to Exercise a Power Exclusively Reserved to Executive Officers Appointed under Article II of the Constitution.

The President, as Chief Executive Officer of the United States, is constitutionally charged with executing federal law. His right and duty to execute the laws are encom-

8. The plethora of citizen suits is not surprising, given the application of strict liability, *Connecticut Fund for the Environment v. Job Plating Co.*, 623 F. Supp. 207, 218 (D. Conn. 1985), and the Act's grant of authority to award counsel fees and litigation responses to a "prevailing or substantially prevailing party," 33 U.S.C. § 1365(d).

9. *Amici* certainly do not question the authority of the courts or heads of departments to appoint inferior Officers when such appointment is authorized by statute. Art. II, § 2, cl. 2. Unlike independent counsel or special prosecutors, private citizens suing under § 505 have not been appointed by, and so are not subject to the supervision of, any persons authorized to do so under Article II. *See infra* note 12.

10. *Contra, Chesapeake Bay Foundation, Inc. v. Bethlehem Steel Corp.*, Civ. No. Y-84-1620, slip op. at 1-10 (D. Md. Jan. 30, 1987). *See also Student Public Interest Research Group of New Jersey v. Monsanto Co.*, 600 F. Supp. 1474, 1478-79 (D.N.J. 1985).

passed within the broad grant of executive power in Article II, section 1, clause 1—"The executive Power shall be vested in a President of the United States of America"[11] —and explicitly imposed by section 3 of the same Article: "[H]e shall take Care that the Laws be faithfully executed . . . ." The President is to exercise that right and duty by appointing, supervising, and, if necessary, removing those who execute the laws, pursuant to Article II, § 2, cl. 2, and the Decision of 1789.

Article II, section 2, clause 2 of the Constitution provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Appointments Clause sets forth the exclusive procedure for selecting and authorizing those persons who may execute the laws on behalf of the United States. Unless another provision of the Constitution provides otherwise, the President "shall" nominate and appoint "Officers of the United States" with the advice and consent of the Senate. In the case of "inferior Officers," Congress may by law vest the right to appoint them in the President alone, in the courts, or in the heads of executive departments. *Buckley v. Valeo*,

11. *See, e.g., Myers v. United States*, 272 U.S. 52, 117 (1926) ("The vesting of the executive power in the President was essentially a grant of the power to execute the laws.").

424 U.S. 1, 127 (1976).[12] These are the *only* methods by which Officers of the United States may be selected.[13]

The power to remove Officers of the United States from their positions also is vested in the President, except where Congress chooses to avail itself of the remedy of impeachment. *Cf. Bowsher v. Synar*, 106 S. Ct. 3181, 3187–88 (1986). The removal power has been acknowledged as properly a part of the President's executive authority since the first session of the First Congress in 1789. *Myers v. United States*, 272 U.S. 52, 111–57 (1926). As recounted in *Myers*

12. The phrase "Heads of Departments," used as it is in conjunction with the phrase "Courts of Law," suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch. While the Clause expressly authorizes Congress to vest the appointment of certain officers in the "Courts of Law," the absence of similar language to include Congress must mean that neither Congress nor its officers were included within the language "Heads of Departments" in this part of cl. 2.

Buckley v. Valeo, 424 U.S. 1, 127 (1976); *see also id.* at 128–29.

13. Unless their selection is elsewhere provided for, *all* officers of the United States are to be appointed in accordance with the [Appointments] Clause. . . . No class or type of officer is excluded because of its special functions. The President appoints judicial as well as executive officers. Neither has it been disputed . . . that the Clause controls the appointment of the members of a typical administrative agency even though its functions, as this Court recognized in *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935), may be "predominantly quasi-judicial and quasi-legislative" rather than executive. The Court in that case carefully emphasized that although the members of such agencies were to be independent of the Executive in their day-to-day operations, the Executive was not excluded from selecting them. *Id.*, at 625–626.

Id. at 132–33 (emphasis in original). *See also United States v. Germaine*, 99 U.S. 508, 509–10 (1878) ("That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt." *Id.* at 510).

and other sources,[14] spirited debate in that first session of Congress led to "a legislative declaration that the power to remove officers appointed by the President and the Senate vested [by virtue of the Constitution] in the President alone." *Id.* at 114.

The *Myers* Court noted that the President may have need to "supervise and guide" those who execute the laws in their construction of the statutes which they enforce, "in order to secure that *unitary and uniform execution of the laws* which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." 272 U.S. at 135 (emphasis added).

> Furthermore, [l]aws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control.

Id. Even where duties may be "peculiarly and specifically committed to the discretion of a particular officer," or quasi-judicial in nature, the President may remove an officer on the ground that the discretion statutorily entrusted to him "has not been on the whole intelligently or wisely exercised. Otherwise [the President] does not discharge his own constitutional duty of seeing that the laws be faithfully executed." *Id.*

It is clear that to ensure proper execution of the laws the President must have *responsibility*, in the form of both political accountability and unitary control and supervision, to ensure uniform implementation of the laws. These principles underlie Article II itself, the powers granted therein, and

14. *See, e.g.*, C. Thach, *The Creation of the Presidency 1775-1789* at 140-65 (1969).

those derived from it. These very principles are violated and Article II is contravened by citizen suits for civil penalties under section 505 of the Clean Water Act.

Section 505's purported grant of authority to self-appointed citizen enforcers to perform the "core" executive function of bringing enforcement suits on behalf of the government offends Article II, under which only the President and executive Officers may be charged with executing the laws of the United States. *Bowsher v. Synar*, 106 S. Ct. 3181, 3187–89, 3191 (1986); *Buckley v. Valeo*, 424 U.S. 1, 118–19, 126 (1976). *Buckley* and *Bowsher* examined the nature of statutorily authorized actions in order to determine whether the authorizations were consistent with Article II. The critical question in both cases was whether delegated powers involved "execution of the law" in a constitutional sense. *Buckley*, 424 U.S. at 137–41; *Bowsher*, 106 S. Ct. at 3191–92. Finding that they did, this Court held that the powers in question constitutionally could not be assigned to persons who were not appointed (*Buckley*) or removable (*Bowsher*) in accordance with Article II. *Buckley*, 424 U.S. at 140–41; *Bowsher*, 106 S. Ct. at 3192.

Buckley and *Bowsher* provide complementary statements of the test to be applied in such cases. According to *Buckley*, the proper inquiry is whether the assigned powers involve the exercise of "significant authority pursuant to the laws of the United States." 424 U.S. at 126. *Bowsher* phrased the test in the negative: whether the powers are "essentially ministerial and mechanical so that their performance does not constitute 'execution of the law' in a meaningful sense." 106 S. Ct. at 3192. Only Article II Officers or their designees may exercise "significant authority" pursuant to federal law or "execute the law."

Authority to bring civil actions for the imposition of civil penalties payable to the federal treasury is manifestly significant. It also is unquestionably part of the executive func-

tion. Such

> enforcement power, exemplified by . . . discretionary power to seek judicial relief, is authority that cannot *possibly* be regarded as merely in aid of the legislative function of Congress. *A lawsuit is the ultimate remedy for a breach of the law,* and it is to the President . . . that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed."

Buckley, 424 U.S. at 138 (citation omitted and emphasis added); *see also id.* at 139–40. Moreover, any decision whether to bring a legal action necessarily requires the exercise of "judgment concerning facts that affect the application" of the law—hardly a ministerial or mechanical function. *Bowsher,* 106 S. Ct. at 3192. Citizen suits for civil penalties under section 505 thus clearly constitute "execution of the law" within Article II, and the grant of authority to bring such suits to persons who are not appointed by the President or subject to his supervision and removal is unconstitutional.[15]

III. Citizens Are Not Subject to Any of the Constraints which Apply to the Exercise of Enforcement Discretion by EPA and the States.

The constitutional flaw in authorizing execution of the law by private citizens is of much more than theoretical significance under the Clean Water Act. Judicious and consistent exercise of enforcement discretion is critical to the fairness,

15. *Qui tam* actions sometimes have been cited wrongly as precedent for or analogous to citizen suits under § 505. *See, e.g., Chesapeake Bay Foundation v. Bethlehem Steel Corp.,* 608 F. Supp. 440, 449 (D. Md. 1985). *"Qui tam"* is a shortened form of a Latin phrase which means "who as well for the lord the king as for himself sues," and *qui tam* plaintiffs are entitled to receive a portion of any penalties recovered. *See, e.g.,* 31 U.S.C. § 3730, which provides for civil actions by informers under the False Claims Act, and entitles such informers to up to 25 percent of the proceeds of their suits. § 3730(b), (c)(2). Under § 505, however, any civil penalties obtained are payable only to the Treasury—citizens have no claim on the proceeds. We have been unable to find any reported decision addressing the constitutionality of *qui tam* actions in the face of a challenge under Article II.

consistency, and ultimately the integrity of the NPDES permitting program. The permitting program is, in turn, central to the Act's highly complex, technology-based regulatory scheme to improve the quality of the nation's waters. Decisions whether, when, why, and against whom to bring enforcement actions thus go to the heart of the overall purpose of the Act. There is no more "significant authority" pursuant to the Clean Water Act than to sue in federal court to enforce it.

EPA and the state agencies charged with responsibility to enforce the Act and to monitor compliance with NPDES permits issued thereunder must have discretionary authority in their enforcement activity. Among the major long-term goals of the Act are the promotion of voluntary compliance with established standards and limitations wherever possible, and the "return [of] all noncomplying permittees to compliance as quickly and efficiently as practicable." EPA Office of Water, Compliance/Enforcement Strategy for the Clean Water Act 24 (1983). The most efficient means to ensure compliance often will not be an enforcement action. EPA's policy guidelines for enforcement personnel include various considerations to be taken into account in determining an appropriate "level of enforcement response," including "fairness and equity, national consistency and the integrity of the NPDES program."[16] Moreover, EPA has

16. EPA's guidance documents state that

> [w]hen making determinations on the level of the enforcement response, the technical and legal staff should consider the degree of variance from the permit condition or legal requirement, the duration of the violation, previous enforcement actions taken against the violator, and the deterrent effect of the response on the similarly situated regulated community. Equally important are considerations of fairness and equity, national consistency and the integrity of the NPDES program.

EPA Office of Water, The Enforcement Management System: National Pollutant Discharge Elimination System (Clean Water Act), Attachment B: Enforcement Response Guide 1 (1986). *See also id.*, Attachment A: Violation Review Process 1-2 (noting that the decision to bring an enforcement action should not be based solely on whether there has been a violation, and setting forth other factors to be considered).

issued a Civil Penalty Policy to guide its personnel in calculating an appropriate penalty in enforcement actions. This policy was prepared, in part, to further the Act's goals of "deterrence, [and] fair and equitable treatment of the regulated community." EPA Civil Penalty Policy, Env't. Rep. (BNA) (Fed. Laws) 41:2991 (Feb. 16, 1984).

EPA and the regulated community have operated under the shared assumption that when Congress mandated the establishment of technology-based standards and limitations under the Act it was, in a sense, requiring EPA to reach some reasonable compromise between the limits of engineering capability and predictability, on the one hand, and the technology-forcing goals of the Act on the other. EPA performs studies and then establishes standards and Effluent Limitations Guidelines ("ELGs") at levels which it believes can be justified as a general matter,[17] while essentially conceding that permittees cannot necessarily achieve one hundred percent compliance with them. The reality is that, in setting its standards, EPA has relied on enforcement discretion as a safety valve to relieve the unfairness of a rigid liability scheme applied to uncertain and predictive standards, and the courts have approved this approach. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1057–58 (D.C. Cir. 1978); *CPC International, Inc. v. Train*, 540 F.2d 1329, 1338 (8th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977). *But cf. Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1272–73 (9th Cir.

17. For a general discussion of the process by which EPA develops ELGs, see 38 Fed. Reg. 21202, 21202–03 (Aug. 6, 1973).

1977); *FMC Corp. v. Train*, 539 F.2d 973, 986 (4th Cir. 1976).[18]

Some permit exceedances result from circumstances which are simply beyond the reasonable control of permittees. EPA's "bypass" and "upset" regulations, 40 C.F.R. § 122.41(m), (n), address certain exceptional incidents of this nature, but those regulations do not cover all such incidents. EPA recognizes that its upset and bypass regulations fail to address certain permit exceedances which should be excused. It therefore relies upon enforcement discretion as a supplement to the upset and bypass exceptions to strict liability.[19]

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18. *See also* Preamble to Proposed Iron and Steel Manufacturing Point Source Category Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards, 46 Fed. Reg. 1858 (January 7, 1981). This preamble addresses enforcement discretion as follows:

> One additional topic that warrants discussion is the operation of EPA's NPDES enforcement program, *many aspects of which have been considered in developing this regulation.* The Agency wishes to emphasize that, although the CWA is a strict liability statute, the initiation of enforcement proceedings by EPA is discretionary. EPA has exercised and intends to exercise that discretion in a manner which recognizes and promotes good faith compliance efforts and conserves enforcement resources so as to maximize their availability for actions against those who fail to make good faith efforts to comply with the Act.

46 Fed. Reg. at 1870 (emphasis added). The preamble to the Final Rule contains virtually the same language. 47 Fed. Reg. 23258, 23281 (May 27, 1982).

19. *See, e.g.*, 49 Fed. Reg. 37998, 38038–39 (September 26, 1984) (stating that the NPDES regulations would not include a formal upset defense for exceedances of water-quality-based permit limitations because it would not be "practical" to implement; instead, the Agency would "continue to evaluate such discharges on a case-by-case basis and use its discretion in deciding whether to bring an enforcement action."); 44 Fed. Reg. 32854, 32862–63 (June 7, 1979) (indicating that the Agency will consider factors not expressly included in the "bypass" regulations when exercising its discretion to enforce against permit exceedances caused by the bypassing of pollution control equipment, and that even where a permittee cannot identify the cause of an alleged upset, "the Agency may still exercise prosecutorial discretion not to enforce in situations where it is not warranted.")

In cases where no generally applicable ELG or other standard has been promulgated for a particular effluent or discharge, a permit writer exercises "Best Professional Judgment" to establish a limitation in a particular permit. Limitations derived in this manner are necessarily predictive in nature, and the best judgment of even a knowledgeable permit writer may be mistaken.[20] There is virtually no recourse for permittees unfortunate enough to find themselves subject to permit limitations based upon such erroneous predictions, other than reliance upon the good faith exercise of enforcement discretion by the executive agency charged with enforcement responsibility.[21] The exercise of enforcement discretion is essential to assure equitable enforcement of the law in such cases.

Private citizens who bring civil actions for penalties under section 505 are not subject to EPA's enforcement guidelines and policies or to the constraints of good faith and fair dealing which apply to all administrative agencies. They

20. At least one court has noted, and EPA has tacitly admitted, that occasionally the Agency's prediction of what results a given technology will produce may simply be incorrect. *FMC Corp. v. Train*, 539 F.2d 973, 984 (4th Cir. 1976); Preamble to Final National Pollutant Discharge Elimination System Permit Regulations, 49 Fed. Reg. 37998, 38039–40 (September 26, 1984) (noting that the regulations as of that date did not allow modification of a permit during its term on the grounds of either mistaken prediction by the permit writer or failure of technology, and indicating that the allowable bases for permit modification were being expanded to include such grounds, effective October 26, 1984). The relevant permit modification provision has been codified at 40 C.F.R. § 122.62(a)(17). *Cf.* 33 U.S.C. § 1342 (o)(2)(B)-(E).

21. Even permittees who are unable to comply with their permits due to mistaken prediction or failure of technology, and who since late 1984 may qualify for permit modification under 40 C.F.R. § 122.62(a)(17), are subject to liability under the Act. They too must rely on the good faith exercise of enforcement discretion by the executive agencies with respect to those permit exceedances which occur prior to any permit modification.

may have no interest in the effective, fair, nationally uniform, and constitutional enforcement of the statute. Moreover, their exercise of the unlimited authority to bring suit granted by section 505 can and does interfere with execution of the Act by EPA and state agencies.

IV. Citizen Suits for Civil Penalties under Section 505 Interfere with Executive Enforcement of the Act and Produce Inconsistent and Unjust Results.

Citizen plaintiffs under section 505 have been viewed as "standing in the shoes of" EPA or state enforcement agencies, and as seeking the same relief. *See, e.g., Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 448 (D. Md. 1985). The Bethlehem court held that citizens therefore should have at least as long a period in which to bring enforcement actions as EPA would have—and a longer period than a state enforcing agency would have with respect to the very same alleged violations. *Id.* at 446–50 (federal five-year period of limitations applies to citizens, rather than one- or three-year state statutes of limitations).[22] The Bethlehem court reasoned that citizens' "'recourse to the courts is appropriate only when the administrative action taken is less than adequate,'" and that "[a] citizen has no opportunity to determine whether the EPA administrative enforcement procedures are adequate until the limitations period for the EPA has nearly passed." *Id.* at 448, quoting in part *Massachusetts v. United States Veterans' Administration*, 541 F.2d 119, 121 (1st Cir. 1976). *Accord, Student Public Interest Research Group of New Jersey v. Tenneco Polymers, Inc.*, 602 F. Supp. 1394, 1399 (D.N.J. 1985).

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22. The *Bethlehem* court recognized the need for national uniformity in the enforcement of the Clean Water Act when it rejected the analogous one-year state statute of limitations in favor of the five year statute provided in 28 U.S.C. § 2462, 608 F. Supp. at 447–50. *See, e.g., id.* at 448 ("The application of a state statute of limitations would . . . produce non-uniform enforcement as between citizens and the government.").

Aside from the question of what standards citizens or the courts are to apply in determining whether governmental enforcement is "adequate," the quoted language from the *Bethlehem* case raises at least two important issues. First, how do citizen suits for civil penalties affect the overall execution of the Act, in terms of the timing or sequence of private and governmental enforcement actions? Second, how do such suits affect the overall execution of the Act when they seek penalties for alleged violations which federal and state authorities have determined not to be proper subjects for enforcement? These issues will be addressed separately.

Citizen suits threatened and instituted in recent years have raised thorny problems of consistency and finality of decisions relating to governmental enforcement under other provisions of the Act. Whether couched in terms of issue or claim preclusion, "diligent prosecution" under section 505(b)(1)(B), administrative prerogative or efficiency, or basic fairness, the problems all concern the tension between executive enforcement and citizen enforcement of the Act. Should preclusive effect be given to governmental enforcement actions instituted and concluded prior to the issuance of citizens' sixty-day notice letters, those instituted after the issuance of such letters, or others instituted after commencement of a citizens' suit? At least one court has held that a civil enforcement action instituted and concluded by the State of Connecticut prior to institution of a citizen suit did not bar a later citizen suit on the same alleged violations. *Connecticut Fund for the Environment v. L & W Industries*, 631 F. Supp. 1289, 1291 (D. Conn. 1986). *But see Student Public Interest Research Group of New Jersey v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1432 (D.N.J. 1985) (prior EPA enforcement action barred subsequent citizens' litigation on violations adjudicated therein).

Amici believe that the *L & W Industries* case was wrongly decided. That decision demonstrates, however, the lengths to which some courts have gone in interpreting section 505

to authorize citizens' second-guessing of governmental enforcement under the Act. Duplicative enforcement actions necessarily waste private and judicial resources. The most serious defect of such actions, however, is their obvious potential to produce unfair results and inconsistent, unnecessary, and redundant enforcement proceedings, thus interfering substantially with executive implementation of the Act.

Other forms of citizen interference with executive administration of the Act are less obvious but equally significant. By requiring citizens to give notice of their intent to sue, 33 U.S.C. § 1365(c)(3), Congress clearly intended to trigger administrative review of the alleged violations and to provide a discrete opportunity for executive enforcement.[23] Yet, theoretically, an alleged violation that occurred as few as sixty-one days prior to the filing of the complaint in a citizen suit, and as to which no governmental enforcement determination had been made, would be sufficient to require a district court to hear the case. The same hypothetical violation would give rise to jurisdiction even if the appropriate administrative agencies had made an enforcement decision not to prosecute. In either event, exercise of the courts' jurisdiction effectively precludes or overrules the executive

23. Courts have undermined this process by allowing citizens to amend their complaints to allege violations which had not been identified in the original 60-day notice, without requiring any additional notice to EPA. *See, e.g., Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 450–51 (D. Md. 1985); *Kitlutsisti v. Arco Alaska, Inc.*, 592 F. Supp. 832, 842 (D. Alaska 1984), *vacated as moot*, 782 F.2d 800 (9th Cir. 1986).

agency's determination whether to penalize specific permit exceedances.[24]

A similar situation may arise where a permittee works in close communication and consultation with the federal or state permitting authority to perfect promising but experimental treatment technology. The agency's exercise of its enforcement discretion not to bring an action for violations of a NPDES permit while the permittee is working in good faith to fine tune or adjust new pollution control technology, or new applications of existing technology, should not be ignored or summarily rejected by a district court in a citizen suit.

If the regulated community cannot have confidence that positions it has negotiated in good faith with the regulators will not be subject to attack in parallel enforcement actions under section 505, a major incentive for industry to voluntarily engage in efforts to further the Act's goals will be eliminated. No permittee is likely to undertake experimental applications of technology under such circumstances, and valuable innovations thus may not be achieved.[25]

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24. It is not clear whether agency decisions not to enforce against specific permit exceedances are subject to judicial review, or if so, what the appropriate standard may be. *See Heckler v. Chaney*, 105 S.Ct. 1649 (1985). Without deciding these issues, courts hearing cases under § 505 have essentially disregarded the executive agency's judgment regarding appropriate enforcement of the Act. This runs counter to the fundamental principle of administrative law that courts should avoid substituting their own judgment for that of the agency on determinations of discretion and policy. K. Davis, *Administrative Law Treatise* § 29.00-1 at 520 (1982 Supp.).

25. EPA's administration of the NPDES program also may be more difficult as a result of recent citizen suits. Without the ability to rely on the Agency's proper exercise of enforcement discretion, permittees' vulnerability to such suits will lead them to oppose ELGs, challenge more proposed permits, and request more permit modifications in order to ensure that they can comply with permit limitations *all* of the time.

The foregoing are but a few examples of situations which arise under the complex, technical regulatory scheme of the Clean Water Act. If the law is to be executed in a fair and rational manner, and if the NPDES permitting process is to have integrity, enforcement of the Act must be coordinated by the Executive Branch as required by the Constitution.[26]

The dilemma that citizen suits pose for the regulators is reflected in the government's inability to adopt a rational, consistent position with respect to them. While professing not to oppose citizen suits per se, the Department of Justice has argued on behalf of EPA that "the United States is not and should not be bound" by their results unless the Executive joins as a party. Letter from Stephen D. Ramsey,

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26. The Executive's ability to intervene in citizen suits, 33 U.S.C. § 1365(c)(2), does not provide sufficient executive coordination and control of such suits. There is no indication that EPA could intervene in a citizen's action in order to stop that action from going forward where it has determined that no enforcement is appropriate, for example. *See Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 660 (3d Cir. 1976), *cert. denied*, 430 U.S. 975 (1977). Nor should the government be required to expend its limited enforcement resources to intervene in every citizen suit.

Chief, Environmental Enforcement Section, U.S. Department of Justice, to the Honorable H. Lee Sarokin, United States District Court for the District of New Jersey 5 (January 3, 1985) [hereinafter cited as "Ramsey letter," App. A-1, A-6].[27]

The Ramsey letter plainly concedes that if citizen suits are deemed to bind the government—as they do and must[28]—such suits necessarily interfere with executive implementation and enforcement of the Act. The reasons offered for this conclusion shed light on the potential of citizen suits to undermine and divert executive enforcement of the Act. Mr. Ramsey notes, for example, that

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27. This position appears to have been considered and rejected by Congress in 1986, in the form of a House amendment to Senate Bill S. 1128, the Water Quality Act of 1986. The amendment would have incorporated the position into § 505. Joint Explanatory Statement of the Committee of Conference, 132 Cong. Rec. H10556, 10578 (daily ed. Oct. 15, 1986). It was deleted in conference committee, however, and failed to appear in the bill as finally enacted, *id.* President Reagan vetoed that bill, but Congress subsequently passed an identical bill, the Water Quality Act of 1987. 133 Cong. Rec. H191, 212 (daily ed. Jan. 8, 1987).

The government's position also is inconsistent with the structure of § 505 itself. There would be little need for citizens to notify EPA of their intent to sue if the Agency could essentially ignore that notice and bring a separate enforcement action on the same alleged violations if—and whenever—it believed one to be desirable. Recent amendments to § 505 even more strongly undercut the EPA/Ramsey argument by providing that citizens must serve copies of their complaints on the Executive, and that consent judgments may not be entered in citizen suits in which EPA is not a party prior to 45 days following receipt of copies thereof by EPA and the Attorney General. 33 U.S.C. § 1365(c)(3). These latter provisions were retained at the same time that the House amendment cited above was deleted in conference. 132 Cong. Rec. H10556, 10578 (daily ed. Oct. 15, 1986).

28. *Cf. United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980) (EPA precluded from relitigating violations already decided in proceeding brought by State). The identity of interest between § 505 plaintiffs and government agencies is apparent. See Argument I, *supra*.

> if the United States were legally precluded from filing a subsequent action because a citizen suit on the same violations had been resolved, the entire enforcement scheme envisioned by Congress would be disrupted. Under such circumstances, the United States would be forced to spend its limited resources monitoring and intervening in citizen suits in order to protect federal enforcement interests, thus destroying . . . government enforcement priorities . . . . Requiring the United States to intervene or lose its right to litigate a particular violation would also enable citizens and settling defendants to dictate an enforcement timetable to the federal government, contrary to the desire of Congress that the government be the primary enforcer of the statute.

Ramsey letter at 3–4, App. A-4 to -5.

Mr. Ramsey also noted that the motivation and priorities of citizen plaintiffs may differ from those of government enforcers.

> [A] private plaintiff has an interest in remedying the specific local problem that gave rise to his or her standing to sue. Such a plaintiff may not be interested in advancing the goals of the national law enforcement scheme or the broader public interest in an enforcement strategy that is oriented toward establishing favorable precedents of national applicability, developing consistency in particular areas of the law, and otherwise maximizing the deterrent effects of enforcement efforts. Allowing the public interest, as represented by the United States, to be bound by litigation between private parties would deprive all members of the public not sharing the parties' narrower interests of their day in court.

Ramsey letter at 4, App. A-5. While such private plaintiffs may indeed have other interests to advance, it is clear that *all* section 505 suits are actions to enforce the Act and are brought to vindicate the government's interest. The inconsistencies which result from private enforcement exemplify

the dangers of assigning executive authority to private persons not subject to the supervision of the Executive Branch.

Unlike executive officers under Article II, citizens suing under section 505 are accountable to no one. This state of affairs is antithetical to the Framers' notion of responsible government in general, and responsibility in the execution of the laws in particular. It violates the letter and the spirit of Article II of the Constitution.

CONCLUSION

For the reasons set forth in Petitioner's Brief, *amici* urge the Court to hold that the Clean Water Act does not authorize private citizens to sue for civil penalties for purely past violations of the Act. In the alternative, and for the reasons set forth herein, *amici* urge the Court to hold that the Act's grant of authority to private citizens to sue for civil penalties violates Article II of the Constitution.

Respectfully submitted,

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March 27, 1987

APPENDIX

Appendix

Washington, D.C. 20530
January 3, 1985

Honorable H. Lee Sarokin
United States District Court
District of New Jersey
United States Courthouse and
Post Office Building, Room 347
Newark, New Jersey 07102

Re: *Students Public Interest Research Group of New Jersey, Inc. v. Public Service Electric and Gas Company, Civ. No. 83-1603 SA*

Dear Judge Sarokin:

On May 21, 1984, the United States Environmental Protection Agency (EPA) was ordered to show cause why the proposed Consent Decree in the above-named action should not be entered. The government filed comments objecting to certain terms of the Decree. See the Response of the United States Environmental Protection Agency, Region II, Office of General Counsel, Water, Grants, and General Law Branch to Order to Show Cause. As set forth in that response, it is the United States' position that the above-named action, which was commenced pursuant to the authority of section 505 of the Clean Water Act, 33 U.S.C. 1365, does not in any way limit or restrict the power and authority of the government to address past, continuing, or prospective violations of the Act under its statutory enforcement authority pursuant to section 309 of the Act, 33 U.S.C. 1319.

We have recently received a brief filed by Plaintiff Student Public Interest Research Group of New Jersey and a

letter from counsel for Plaintiff. This letter is intended to clarify the United States' position in response to continued inquiry from counsel for both parties and the brief filed by Defendants. The government will of course be available to appear at any hearing set by the Court to address the matters set forth in this letter. We consider this issue to be of fundament [sic] importance to the government's ability to enforce environmental statutes and to the viability of citizen enforcement. Our views are as follows.

The United States' authority to enforce regulations, standards, and permit conditions established under the Clean Water Act is not affected by entry of a consent decree between two private parties in an action brought under section 505 of the Act. We are concerned that the language of paragraph 7, page 7 and paragraph 12, page 10 of the proposed Decree may be construed as limiting the enforcement powers of EPA. It is the United States' position that these provisions cannot and do not interfere with the rights of the United States. Nonetheless, to resolve all doubt regarding these provisions, the court may wish to refrain from entering the Decree until the terms of the Decree conform fully with the statutory scheme and existing law.

The court's authority to monitor the terms of a decree is well-settled. Prior to approving a consent decree a court must satisfy itself of the settlement's overall fairness to beneficiaries and consistency with the public interest. *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 2668 (1984). In determining consistency with the public interest, the court must focus on the purposes the relevant statute is intended to serve. *Id.* at 1125; see *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961) (district court's authority to adopt a consent decree comes only from statute decree is intended to enforce, not from parties' consent to decree); *United States v. Motor Vehicle Mfrs. Ass'n of the United States, Inc.*, 643 F.2d 644, 650–51 (9th Cir. 1981) (parties may not enter into consent judgment inconsistent with stat-

utory framework under which action was brought). In determining that a decree is consistent with the Constitution and the mandate of Congress, that the terms of the decree are fair and adequate, and that the settlement is reasonable under the circumstances, the court must eschew any rubber stamp approval. *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1337–38 (S.D. Indiana 1982); see *United States v. Hooker Chemicals & Plastics Corp.*, 540 F. Supp. 1067, 1072–73 (W.D.N.Y. 1982). Independent evaluation by the court is particularly important where, as here, the decree is based on a federal environmental statute and the United States is not a party. Accordingly, to the extent the court determines that the terms of the Consent Decree impermissibly purport to restrict the authority of the United States, the court may wish to require the parties to amend the Decree to conform to the Clean Water Act. In any event, however, the Decree does not and cannot preclude the United States from maintaining an action concerning the same violations addressed by the Decree.

Private citizen suits under the Clean Air and Clean Water Acts were intended to supplement and encourage federal and state enforcement efforts. See Environmental Policy Division, Congressional Research Service, *A Legislative History of the Clean Air Amendments of 1970*, at 263, 436–39 (1974). See also Environmental Policy Division, Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 1497–98 (1973). Government enforcement, however, remains the primary mechanism for ensuring that the objectives of these Acts are achieved. Citizens must give notice to the United States prior to filing suit, and if the United States proceeds diligently with a judicial action, the private plaintiffs are foreclosed from proceeding. See, *e.g.*, section 505(b)(1)(A)(i) of the Clean Water Act, 33 U.S.C. 1365(b)(1)(A)(i).[1]

1 Citizens may intervene in a federal enforcement action, 33 U.S.C. §1365(b)(1)(B), and are permitted by regulation, 28 C.F.R. 50.7, to comment on proposed consent decrees.

In cases where the United States does not file an enforcement action, whether because of resource limitations or other factors, nothing in the Clean Water Act or its legislative history suggests that the preeminent government enforcement role could be undermined by private party litigation. Neither notice of the suit nor notice of a proposed or final settlement alters the United States' rights under the Act, absent intervention or control of the litigation by the United States. See *Montana* v. *United States*, 440 U.S. 147 (1979).

The continuing authority of the United States to institute an enforcement action following a suit by a private plaintiff has been repeatedly upheld. See, *e.g.*, *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56 (5th Cir. 1979); see *Hathorn v. Lovorn*, 457 U.S. 255, 268 n.23 (1982); *City of Richmond v. United States*, 422 U.S. 358, 373–74 n.6 (1975); *Donovan v. Cunningham*, 716 F.2d 1455, 1462 (5th Cir. 1983). The authority exists because the interests of the United States and private plaintiffs are distinct. "The United States has an interest in enforcing federal law that is independent of any claims by private citizens." *United States v. East Baton Rouge Parish School Board*, 594 F.2d at 58. See generally 18 C. Wright & A. Miller, *Federal Practice and Procedure* [4458 at 517–20 (1981).

Indeed, if the United States were legally precluded from filing a subsequent action because a citizen suit on the same violations had been resolved, the entire enforcement scheme envisioned by Congress would be disrupted. Under such circumstances, the United States would be forced to spend its limited resources monitoring and intervening in citizen suits in order to protect federal enforcement interests, thus destroying both government enforcement priorities and the purpose of the citizen suit provision. As the court stated in the *United States v. East Baton Rouge Parish School Board*, 594 F. 2d at 58, binding the United States to private plaintiff litigation "would impose an onerous and extensive burden upon the United States to monitor private litigation in

order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention." Requiring the United States to intervene or lose its right to litigate a particular violation would also enable citizens and settling defendants to dictate an enforcement timetable to the federal government, contrary to the desire of Congress that the government be the primary enforcer of the statute.

Moreover, a private plaintiff has an interest in remedying the specific local problem that gave rise to his or her standing to sue. Such a plaintiff may not be interested in advancing the goals of the national law enforcement scheme or the broader public interest in an enforcement strategy that is oriented toward establishing favorable precedents of national applicability, developing consistency in particular areas of the law, and otherwise maximizing the deterrent effects of enforcement efforts. Allowing the public interest, as represented by the United States, to be bound by litigation between private parties would deprive all members of the public not sharing the parties' narrower interests of their day in court.

Finally, where the United States retains the authority to seek both compliance and penalties for the entire period of any noncompliance, including noncompliance that continues during and after a citizen suit, a defendant has an additional incentive to provide and adhere to a reasonable compliance schedule when negotiating with a citizen plaintiff. This promotes the statutory scheme.

In the Senate Report supporting the Solid Waste Disposal Act Amendments of 1983, which added to the citizen suit provision of that Act the same penalty provision present in the Clean Water Act, the concerns discussed above led the Senate to note expressly that private litigation of a request for civil penalties or the granting of such an award "will not, in any way, limit or preclude the right of the United States to seek or obtain the payment of penalties arising out of the same or related violations, except that the maximum

penalty to be paid for each violation shall not exceed that provided in section 3008" (the government enforcement provision). The United States agrees that under the Clean Water Act as well, the full extent of a violator's civil penalty liability may be recovered only once; however, as under the amended Solid Waste Disposal Act, the government may seek to recover any portion of a violator's potential civil penalty liability not recovered in a prior citizen suit. Similarly, assuming a continuing violation, the United States may seek to obtain compliance with the Clean Water Act and its implementing regulations more rapidly or more comprehensively than provided by the relief obtained in a prior citizen suit.

As a matter of practice, the United States will very rarely initiate an enforcement action following the resolution of a citizen suit. Limited federal enforcement resources will require the United States to evaluate carefully the results of a prior citizen suit and to weigh the need for and cost of an additional suit against other federal enforcement priorities. Only in unusual circumstances would the United States reverse its initial discretionary decision not to proceed against the violation in issue.

In sum, there are sound legal and policy reasons why the United States is not and should not be bound by the results of a citizen suit to which the government is not a party. Thus, the United States wishes to make clear that it does not consider itself bound in any way by the Decree. For the reasons discussed above, the court may wish to require modification of the terms of the Decree to reflect the structure and purposes of the Clean Water Act and existing case law.

We would be pleased to provide any additional clarification that is needed regarding our position on this issue.

Respectfully submitted,

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No. 86-473

IN THE

Supreme Court of the United States

October Term, 1986

GWALTNEY OF SMITHFIELD, LTD.

Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.

and

NATURAL RESOURCES DEFENSE COUNCIL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF FRIENDS OF THE EARTH, SIERRA CLUB, NATIONAL AUDUBON SOCIETY, PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP, ATLANTIC STATES LEGAL FOUNDATION, AND CONNECTICUT FUND FOR THE ENVIRONMENT IN SUPPORT OF RESPONDENTS

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No. 86-473

IN THE

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GWALTNEY OF SMITHFIELD, LTD.

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BRIEF *AMICI CURIAE* OF FRIENDS OF THE EARTH, SIERRA CLUB, NATIONAL AUDUBON SOCIETY, PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP, ATLANTIC STATES LEGAL FOUNDATION, AND CONNECTICUT FUND FOR THE ENVIRONMENT IN SUPPORT OF RESPONDENTS

This brief *amici curiae* is submitted in support of respondents Chesapeake Bay Foundation, Inc. and Natural Resources Defense Council. The petitioner and respondents have consented to the filing of this brief. Their letters of consent have been filed with the Court.

STATEMENT OF INTEREST OF AMICI

The seven organizations submitting this brief, together with the two plaintiff organizations, have been the primary plaintiffs bringing citizen suits to enforce the Federal Water Pollution Control Act ("the Water Act") during the past several years. Their members live and engage in recreational activities on or near the waterways into which companies discharge pollutants regulated by the Water Act. Petitioner's interpretation would allow dischargers who violate their permits and discharge excessive

amounts of pollution into this nation's waterways to avoid all liability for civil penalties under the Water Act if the violations ceased prior to the filing of a citizen suit. *Amici* submit that this interpretation would remove an essential incentive for polluters to comply with their permits, thereby adversely affecting *amici*'s members and the public at large.

Amici have brought numerous citizen suits under the Water Act in recent years. Contrary to petitioner's arguments (Pet. Br. 30-33), these suits were not motivated by the prospect of obtaining settlement monies for themselves, but rather by the knowledge of widespread noncompliance by dischargers and lax enforcement by government officials. For example, after analyzing a random sample of 531 major dischargers in six states, the General Accounting Office reported to Congress in 1983 that 82% exceeded their permit limits at least once in an 18-month period, and 31% exceeded their permit limits by 50% or more in at least 4 consecutive months during that time. Wastewater Dischargers Are Not Complying with EPA Pollution Control Permits, General Accounting Office, RCED-84-53, December 2, 1983, p. 7. At the same time, the GAO found that, on a national basis, the number of EPA enforcement actions declined from 1,523 in 1977 to 410 in 1982. *Id.* at 24-25. The EPA official who testified before a House oversight committee in 1984 concerning this report candidly acknowledged the shortcomings of governmental enforcement of the Water Act:[1]

> With respect to the report itself, Mr. Chairman, regardless of how one measures, regardless of how one counts, regardless of whether you look at the permittees in a particular category over 3 months, 12 months or 18 months, the trend is, in fact, the same: We continue to see a significant degree of noncompliance by permittees and we continue to see the EPA and the States falling behind in their workload.

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1. *Hearings on Implementation of the Federal Clean Water Act Before the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation*, 98th Cong., 2d Sess. 51 (March 7, 1984) (testimony of Jack E. Ravan, EPA Assistant Administrator for Water).

The GAO concluded in its report (p. 42) that significant enforcement resources were needed to correct this problem:

> We anticipate that the program's problems will continue because the underlying causes of many of these problems lie in the area of limited resources at both the federal and state levels. * * * Stronger enforcement against permit noncompliance is needed. * * * What can be expected * * * in the foreseeable future is continued high noncompliance and inadequate enforcement unless significant resources are directed to the program.

As a result, *amici* began using the citizen suit provisions of the Water Act on an intensive basis. Subsequently, the Senate committee report on the 1987 amendments to the Water Act stated (S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985)):

> Citizen suits are a proven enforcement tool. They operate as Congress intended—to both spur and [as a] supplement to government enforcement actions. They have deterred violators and achieved significant compliance gains.

SUMMARY OF ARGUMENT

A. Petitioner's interpretation of Section 505(a)(1) of the Act is inconsistent with the language and structure of the Act. It conflicts with this Court's recent decision in *Tull v. United States* that civil penalties necessarily relate to the punishment of past acts and are independent of injunctive relief. It conflicts with the 60-day notice provision of that Section. It unreasonably treats dischargers with identical noncompliance records totally differently based on the happenstance of when a citizen suit is filed. And it ignores the similar authorization for the imposition of civil penalties in both federal and citizen suits.

B. The legislative history of the Water Act demonstrates that Congress intended to authorize both citizen and government enforcement actions involving past violations, whether continuous

or intermittent. That history further demonstrates that Congress intended to make citizen and government enforcement powers co-extensive. If the United States and the states could seek civil penalties for past violations, but citizens could not, citizens could not effectively substitute for these governments when they fail to carry out their responsibility to enforce the Water Act.

C. The language and legislative history of the 1987 amendments to the Water Act further demonstrate that Congress intended to authorize suits for past violations. Congress gave EPA authority to assess civil penalties for past violations in administrative proceedings, and stated that citizens could, in some circumstances, seek civil penalties for past violations resulting from the same discharge as that involved in those administrative proceedings.

D. The overwhelming weight of judicial authority is inconsistent with petitioner's interpretation. At least 22 lower court decisions support respondents, while only 4 support petitioners.

E. Petitioner's interpretation would cause serious evidentiary problems. Dischargers do not monitor and report the amount of pollutants in their discharges on a continuous or, in many cases, even a frequent, basis. As a result, distinguishing between chronic, ongoing violations and past, completed ones would be an extremely difficult task. The legislative history of the Act shows that Congress did not intend enforcement actions to require lengthy fact-finding or discretionary decisionmaking, but intended instead that such actions be based on precise and manageable standards.

F. Petitioner's interpretation would remove an essential incentive for dischargers to comply voluntarily with their permits. The whole purpose of civil penalties is to induce timely and voluntary compliance. EPA, the agency charged with administering the statute, has stated that penalties for past violations are essential to carry out this purpose even when the violations have ceased. Otherwise, a discharger could totally escape liability by halting its violations before a citizen suit is filed.

G. Permitting citizens to sue for past violations would not have the adverse effects claimed by petitioner and its *amici*. Citizens, like EPA, have every incentive to use their resources for cases involving numerous and frequent violations, not isolated past violations. Both Congress and the executive branch have recently stated that citizen suits are operating as Congress intended and are not interfering with federal enforcement activities. Finally, the constitutional arguments raised by petitioner and its *amici* are insubstantial.

ARGUMENT

A. THE LANGUAGE AND STRUCTURE OF THE WATER ACT AUTHORIZES CITIZEN SUITS SEEKING PENALTIES FOR PAST VIOLATIONS

Section 505(a)(1) of the Water Act authorizes a citizen suit against any person "alleged to be in violation" of an effluent standard or limitation under that Act. Petitioner argues that because these words are in the present tense, they should be read to mean that citizen suits are limited to ongoing violations that have not abated by the time the suit is filed. Pet. Br. 11. Petitioner therefore concludes that citizens cannot bring suit seeking civil penalties for purely past violations. *Ibid.*

Petitioner's interpretation of Section 505(a)(1) is inconsistent with the language and structure of the Act for four reasons—it ignores the ordinary meaning of the word "penalty" as relating to the punishment of past acts, it conflicts with the 60-day notice provision of that Section, it treats similarly situated defendants completely differently, and it ignores the similar authorization for the imposition of civil penalties in both federal and citizen suits.

First, the very existence of a provision for civil *penalties* on its face contemplates punishment of past acts. As this Court recently stated in *Tull* v. *United States*, 481 U.S. _____ (April 28, 1987), slip op. at 10, the civil penalty provision's "authorization of punishment to further retribution and deterrence clearly evidences that this subsection reflects more than a concern to

provide equitable relief." This Court then held that civil penalties are independent of, and not intertwined with or incidental to, injunctive relief. *Id.* at 12. Thus, "[p]enalties are necessarily imposed on past violations." *SPIRG* v. *AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1198. Obviously, they cannot be imposed on violations that have not yet occurred. Consequently, the phrase "and apply appropriate civil penalties under Section 309(d)" must mean that a court may impose civil penalties for past violations in a citizen suit under Section 505.

Petitioner's construction puts far too much weight on Congress' use of the present tense. "A plausible construction of the language is that one is 'in violation' and continues to be 'in violation' by having 'violated.'" *SPIRG* v. *Monsanto Co.*, 600 F. Supp. 1474, 1476 (D.N.J. 1985). The words "to be in violation" therefore may reasonably be read as to include unlawful conduct occurring before a lawsuit is filed as well as unlawful conduct that continues into the present.

Furthermore, if Congress had used the past tense in conjunction with the civil penalty provision, it "might have created the implication that citizen suits could not seek injunctive relief." *SPIRG* v. *AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1196. Indeed, as we show below (pp. 12-13), when Congress amended the Act this year and used the past tense ("has violated") to describe EPA's new administrative civil penalty authority, it stated its intention in the legislative history to limit such authority to purely past violations. S. Rep. No. 50, *supra*, p. 100.

Second, the combination of the civil penalty provision and the notice requirement in Section 505(b)(1)(A) also shows that Congress did not expect citizens to bring actions only for violations occurring at the time a suit was filed. That subsection requires that citizens give 60 days' notice before filing suit to governmental agencies to "give the administrative enforcement office an opportunity to act on the alleged violation." S. Rep. No. 414, 92d Cong., 1st Sess. 80 (1971). However, if petitioner's argument were correct, Congress would, in effect, be telling citizens to provide 60 days' notice of alleged violations before filing

suit, but then telling them they could not bring suit for civil penalties based on the same violations. Instead, suit could only be brought if new violations-not covered by the notice letter—were occurring at the time of suit. We submit that Congress could not have intended such an absurd result.

Third, petitioner's argument would have the effect of treating dischargers with identical records of noncompliance in totally different ways. Thus, assume that Company A has violated the Act 100 times over a three-year period, but stops its violations a month before the citizen suit is filed, while Company B has the same number of violations over the same time period, except that five of its violations occurred after the citizen suit was filed. Under the amended Water Act, each violation is subject to a penalty up to $25,000 per day for each violation. 33 U.S.C. 1319(d), as amended, 101 Stat. 45. Under petitioner's interpretation, Company A is not subject to any civil penalty, while Company B is subject to a civil penalty up to $2,500,000. We submit that it makes no sense to impose large penalties on a company for pre-complaint violations because it happened to have some violations after the complaint was filed, but no penalties on the company which had no violations after a complaint was filed.

Finally, the structure of the federal enforcement provisions of the Act shows that Congress intended to authorize civil penalties for past violations. The Administrator of EPA is empowered to take enforcement actions by Section 309 of the Act. 33 U.S.C. 1319. The citizen suit provision specifically cross-references the federal government's civil penalty authority in Section 309(d).

All of the federal enforcement provisions are couched in the present tense. Under Section 309(a)(1), the Administrator is authorized to take enforcement action, including court action, whenever he "finds that any person *is in violation* of any condition or limitation * * * " under the Act (emphasis added). Under Section 309(a)(3), the Administrator may issue a compliance order when he "finds that any person *is in violation*" of the Act (emphasis added). Under Section 309(c), criminal penalties

may be imposed on "any person who willfully or negligently *violates*" the Act (emphasis added). Under Section 309(d), civil penalties may be imposed against "any person who *violates*" the Act (emphasis added). Consequently, if the "present tense" is deemed to limit jurisdiction in citizen suits, the same "present tense," used in all of the Act's enforcement provisions, must equally limit suits for civil penalties by the United States.

There is no basis for imposing such a limitation on suits by the United States. On the contrary, it is well established that the United States may sue for penalties under Section 309(d) based on past violations, without a showing of violations at the time of suit. In *Tull* v. *United States*, *supra*, this Court held that the government's claim for civil penalties under the Water Act was not "incidental to" its claim for injunctive relief, and that the government could prosecute that claim even though it "was aware when it filed suit that relief would be limited primarily to civil penalties, since the [defendant] had already sold most of the properties at issue." Slip op. at 12. Similarly, the Court of Appeals for the Tenth Circuit has held that "[i]t is plainly inconsistent with the strong enforcement policy of the Act to declare that EPA must choose between prevention of future pollution discharges and punishment of past violations through civil penalties. The administrator needs both sanctions." *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 376 (10th Cir. 1979).

No reason exists for believing that Congress intended one meaning for the language in Section 309(d) for suits brought by EPA and another meaning for that language for suits brought by citizens. See *SPIRG v. AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1198. Indeed, the cross-reference to Section 309(d) in Section 505(a)(1) necessarily means that citizens, like EPA, can bring enforcement actions to assess penalties for past violations.[2]

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2. We know of no federal statutes under which past violations can be punished only if they are continuing or repeated at the time of suit. This is true even though numerous statutes similarly use the present tense in provisions authorizing the imposition of penalties. See, *e.g.*, Clean Air Act, 42 U.S.C. 7413; Marine Protection, Research and Sanctuaries Act, 33 U.S.C. 1415(a); Noise Control Act, 42 U.S.C. 4290.

B. THE LEGISLATIVE HISTORY OF THE WATER ACT SHOWS THAT THE ACT AUTHORIZES CITIZEN SUITS SEEKING PENALTIES FOR PAST VIOLATIONS

There is nothing in the legislative history of the 1972 Water Act even suggesting that Congress intended its use of the present tense in Section 505(a)(1) to have so drastic an effect as petitioner contends. On the contrary, Senator Muskie, the principal sponsor of the Senate bill, stated during the floor debates that, under the citizen suit provision agreed to by the Conference Committee (118 Cong. Rec. 33700 (1972)):

> A citizen has the right under Section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be, or *to have been*, in violation, whether the violation be a continuous one, or an occasional or sporadic one. [emphasis added]

Thus, Senator Muskie clearly stated that Congress intended to authorize citizen suits based on past violations.

The legislative history of the federal enforcement section of the Act, Section 309(d), further supports this conclusion. Section 309(a) provides that the Administrator of EPA can take enforcement actions, including a civil action to impose civil penalties under Section 309(d), whenever he "finds" a violation to exist. The Senate Conferees' statement on the Conference Report explains that, under this section (118 Cong. Rec. 33697 (1972)):

> It is expected, of course, that upon receipt of information that a violation *has occurred*, [the Administrator] has an affirmative duty to take steps necessary to determine whether a violation *has occurred* including such investigations as may be necessary, and to make his finding as expeditiously as practicable. [emphasis added]

Moreover, the legislative history of the Water Act demonstrates that the scope of enforcement and the remedies available for citizen suits and EPA civil suits are the same. The Senate Report states (S. Rep. No. 414, *supra*, p. 64):

> It should be noted that if the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action under the citizen suit provisions of section 505.

The Senate Report further states (*id.* at 80):

> The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same. Therefore the participation of citizens in the courts seeking enforcement of water pollution control requirements should not result in inconsistent policy.

Moreover, in emphasizing that enforcement actions would be brought against past violators, Senator Muskie pointed to the parallel nature of EPA and citizen enforcement (118 Cong. Rec. 33693 (1972)):

> The Administrator's authority is not limited to those cases in which there is a continuing violation. Any discharge, intermittent or continuous, which the Administrator finds violates the terms of the permit, is to be enforced. • • • Citizen suits can be brought to enforce against both continuous and intermittent violations.

Thus, Congress intended that the various civil enforcement mechanisms be uniform. Otherwise, if EPA and the States could sue for civil penalties for past violations, but citizens could not, this would significantly reduce the effectiveness of citizen enforcement when EPA or the States fail to carry out their responsibilities. Citizens could not effectively substitute for EPA or the states "as private attorneys general"—the term applied to citizen plaintiffs by this Court in *Middlesex County Sewerage Authority* v. *National Sea Clammers' Ass'n*, 453 U.S. 1, 16-17 (1981). For these reasons, numerous district court decisions have similarly recognized that "the remedies obtainable in citizen suits should be coextensive with those available in suits initiated

by the federal government." *Connecticut Fund for the Environment* v. *The Job Plating Co., Inc.*, 623 F. Supp. 207, 213 (D. Conn. 1985). Accord, *SPIRG* v. *Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1425 (D.N.J. 1985); *SPIRG* v. *Monsanto Co.*, *supra*, 600 F. Supp. at 1476; *SPIRG* v. *AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1199.

Petitioner places primary weight on passages from Senate Report No. 414 that emphasize the use of citizen suits to abate ongoing violations. Pet. Br. 26. However, as the court of appeals noted below (791 F.2d at 311), none of these passages state that abatement of ongoing violations is the only relief available under Section 505(a). Indeed, the statute is explicit that this is not the only relief provided since it specifically authorizes citizens to sue for penalties.

Furthermore, the relevance of these passages to the issue before the Court is questionable because each of them is drawn virtually verbatim from the Senate Report on the citizen suit provision of the Clean Air Act. Cf. S. Rep. No. 414, *supra*, pp. 79-81, with S. Rep. No. 1196, 91st Cong., 2d Sess. 36-38 (1970). Since the Clean Air Act does not authorize civil penalties in citizen suits, Congress had no reason to discuss them, and necessarily confined its discussion to the abatement of ongoing violations.

In authorizing such penalties under the Water Act, Congress recognized this fundamental difference between the citizen suit provisions in the two statutes. The House Report on the Water Act states (H. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972)):

> Section 505 closely follows the concepts utilized in section 304 of the Clean Air Act. However, this legislation authorizes the courts to impose civil penalties, as well as injunctive relief.

The Senate Report likewise notes (S. Rep. No. 414, *supra*, p. 79):

> The Committee has established a provision in the bill that would provide citizen participation in the enforcement of control requirements and regulations established under this Act modeled on the provision enacted in the Clean Air

> Amendment of 1970. * * * One modification would allow the Courts to impose civil penalties provided as a result of actions brought by citizens.

Thus, in the Water Act, Congress deliberately gave citizens a second enforcement weapon, civil penalties.

In sum, the legislative history of the 1972 Water Act shows that Congress intended, unlike in the Clean Air Act, to authorize both citizen and government suits for civil penalties based on past violations.

C. THE LANGUAGE AND LEGISLATIVE HISTORY OF THE 1987 AMENDMENTS TO THE WATER ACT SHOW THAT THE ACT AUTHORIZES CITIZEN SUITS SEEKING PENALTIES FOR PAST VIOLATIONS

The language and legislative history of the 1987 amendments to the Water Act further demonstrate that Congress did not intend to limit the reach of the Act's judicial enforcement provisions to prospective violations.

In those amendments, Congress gave EPA new authority to impose civil penalties administratively without filing a judicial enforcement action. Pub. L. 100-4, Section 314, 101 Stat. 46-49. In defining this new authority, Congress authorized EPA to institute such administrative actions where a person "has violated" the Act. 101 Stat. 46. This language contrasts with the present tense language in the judicial enforcement sections, Sections 505 and 309, which Congress left unchanged.

The "has violated" language originated in the Senate. S. Rep. No. 50, 99th Cong., lst Sess. 100 (1985).[3] The Senate Report on this provision states (S. Rep. No. 50, *supra*, p. 26):

> This new authority is designed to address past, rather than continuing, violations of the Act. Continuing violations are more appropriately addressed by abatement orders or

3. The House bill used the words, "is in violation." H. Rep. No. 189, 99th Cong., 1st Sess. 89 (1985).

> injunctive actions and, if EPA seeks both civil penalties and injunctive relief, one judicial action should be filed.

Thus, when Congress wanted to limit enforcement authority to *purely* past violations, it chose the terms "has violated."

Furthermore, Congress intended that citizens would, in some circumstances, be able to bring citizen suits covering this same set of purely past violations. This conclusion is confirmed by a later passage in the same Senate Report which discusses the preclusive effect of administrative civil penalty actions on citizen suits. Under these preclusion provisions, the pendency of an EPA or state administrative enforcement proceeding concerning a violation of the Act may, in certain specified circumstances, prevent "a civil penalty action under * * * Section 505" as to that same violation. 101 Stat. 47-48. The passage in the Senate Report states that this preclusive effect (S. Rep. No. 50, *supra*, p. 28):

> would not apply to an action for civil penalties for a violation of the same requirement of the Act that is not being addressed administratively *or for a past violation of another pollutant parameter (even one resulting from the same discharge which is the subject of the administrative civil penalty proceeding)*. [emphasis added]

Thus, by expressly stating that citizens could, in some circumstances, seek civil penalties for past violations resulting from the same discharge (but a different pollutant parameter) as that involved in an administrative penalty proceeding, Congress necessarily meant that citizens could seek civil penalties for past violations under Section 505.

Consequently, the language and legislative history of the 1987 amendments to the Water Act confirm that citizens can seek penalties for past violations.

D. THE WEIGHT OF JUDICIAL AUTHORITY SUPPORTS RESPONDENTS' POSITION THAT THE ACT AUTHORIZES CITIZEN SUITS SEEKING PENALTIES FOR PAST VIOLATIONS

The lower courts have repeatedly held that citizens may sue for past violations. *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield*, *supra*, 791 F.2d at 313; *Connecticut Fund for the Environment* v. *The Job Plating Co.*, *supra*, 623 F. Supp. at 213-214; *Fishel* v. *Westinghouse Electric Corp.*, 617 F. Supp. 1531, 1541 (M.D. Pa. 1985); *Sierra Club* v. *Hanna Furnace Corp.*, *supra*, 636 F. Supp. at 529-530; *Sierra Club* v. *Simkins Industries*, 617 F. Supp. 1120, 1126-1127, 1131-1132 (D. Md. 1985); *Sierra Club* v. *Aluminum Co. of America*, 585 F. Supp. 842, 854 (N.D.N.Y. 1984); *Sierra Club* v. *Raytheon Co.*, 22 Env't Rep. Cases (BNA) 1050, 1053-1055 (D. Mass. 1984); *Sierra Club* v. *C.G. Manufacturing, Inc.*, 638 F. Supp. 492, 494 (D. Mass. 1985); *State of Alabama ex rel. Graddick* v. *Veterans Administration*, 648 F. Supp. 1208, 1211 (M.D. Ala. 1986); *Locust Lane* v. *Swatara Township Authority*, 636 F. Supp. 534, 539 (M.D. Pa. 1986); *Atlantic States Legal Foundation* v. *Al Tech Specialty Steel Corp.*, 635 F. Supp 284, 287 (N.D.N.Y. 1984); *Friends of the Earth* v. *Archer Daniels Midland Co.*, 24 Env't Rep. Cases (BNA) 1993, 1995-1996 (N.D.N.Y. 1986); *SPIRG* v. *AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1194-1199; *SPIRG* v. *Georgia-Pacific Corp.*, *supra*, 615 F. Supp. at 1425-1426; *SPIRG* v. *Monsanto Co.*, 600 F. Supp. 1479, 1486 (1985); *SPIRG* v. *P.D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074, 1083-1084 (D.N.J. 1986); *SPIRG* v. *Jersey Central Power & Light Co.*, 642 F. Supp. 103, 107 (D.N.J. 1986); *SPIRG* v. *American Cyanamid Co.*, 23 Env't Rep. Cases (BNA) 2044, 2049 (D.N.J. 1985); *SPIRG* v. *National Starch and Chemical Corp.*, 23 Env't Rep. Cases (BNA) 1982, 1984 (D.N.J. 1985); *SPIRG* v. *Tenneco Polymers*, 602 F. Supp. 1394, 1399 (D.N.J. 1985); *SPIRG* v. *Anchor Thread Co.*, 22 Env't Rep. Cases (BNA) 1150, 1154 (D.N.J. 1984); *SPIRG* v. *Ragen Precision Industries*,

D.N.J., No. 83-1604, December 19, 1983, Transcript of Proceedings, p. 7.

In contrast, there are only a handful of decisions supporting petitioner's interpretation of the Act. *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392, 395 (5th Cir. 1985); *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F.2d 1089, 1093 (1st Cir. 1986), petition for certiorari filed, No. 86-1562 (March 17, 1987); *Sierra Club* v. *Copolymer Rubber & Chemical Corp.*, 621 F. Supp. 1013, 1015 (M.D. La. 1985); *Sierra Club* v. *Kerr-McGee Corp.*, 23 Env't Rep. Cases (BNA) 1685, 1690 (W.D. La. 1985).

E. THE EVIDENTIARY PROBLEMS WHICH WOULD RESULT UNDER PETITIONER'S INTERPRETATION SHOW THAT IT IS CONTRARY TO THE INTENT OF THE ACT

Petitioner's interpretation of Section 505 would make it extremely difficult for citizens to exercise their rights under that Section.

Section 308 of the Act gives EPA authority to require record-keeping, monitoring, and reporting of discharges of pollutants. 33 U.S.C. 1318. Under EPA regulations, a permittee under EPA's National Pollutant Discharge Elimination System (NPDES), as petitioner is, must monitor its own discharges according to a schedule established in its permit and report them on a regular basis on Discharge Monitoring Reports (DMRs). 40 C.F.R. 122.41(1)(4). These DMRs constitute the basis for determining whether or not the permit holder is in compliance with its permit limitations.

The timeliness of the data contained in DMRs depends on two variables, the frequency of monitoring and the frequency of reporting. In the present case, petitioner monitored its discharge three times a week. Pl. SJ Motion, Ex. A, pp. B, Q. However, monitoring may be performed on a less frequent basis. EPA regulations only require monitoring with a "frequency sufficient to yield data which are representative of the monitored activity

* * *." 40 C.F.R. 122.48(b). See also 122.41(j)(l). It is not unusual for permittees to monitor only once a month.[4]

As to reporting frequency, petitioner submitted DMRs on a monthly basis. However, DMRs may be submitted less frequently. See, *e.g.*, *SPIRG v. Hercules, Inc.*, *supra*, 23 Env't Rep. Cases (BNA) at 2090 (quarterly reporting). EPA regulations require NPDES permittees (40 C.F.R. 122.44(i)(2)):

> to report monitoring results with a frequency depending on the nature and effect of the discharge, but in no case less than once a year.

Infrequent monitoring and reporting causes two types of problems with the availability of effluent data. First, there may be a considerable period of time between the date the discharge is monitored and the date that the DMR is mailed to EPA and therefore becomes available to the public. For example, in *SPIRG v. Hercules, Inc.*, *supra*, 23 Env't Rep. Cases (BNA) at 2090, the defendant monitored once a month, prepared a DMR once every three months, and was required to mail that DMR to EPA "no later than the 28th day of the month following the completed reporting period". Thus, in that case, there was a delay of about 4 months between the first monitoring event of the quarter and the date that event became known to the public. Consequently, it is often impossible for citizens to determine a permittee's current compliance status.

Second, there may be considerable periods of time between successive monitoring days, as well as between successive DMRs. Monitoring may occur on only three days over three months, or even one day over a six-month period. In addition, DMRs may be filed every three months, every six months, or even every twelve months. Thus, neither monitoring nor reporting is "continuous." Those activities are regular, but infrequent. As a result, the

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4. See, *e.g.*, *SPIRG* v. *American Cyanamid Co.*, *supra*, 23 Env't Rep. Cases (BNA) at 2050; *SPIRG* v. AT&T Bell Laboratories, *supra*, 617 F. Supp. at 1204-1205; *SPIRG* v. *Hercules Corp.*, 23 Env't Rep. Cases (BNA) 2081, 2090-2091 (D.N.J. 1986); *SPIRG* v. *National Starch and Chemical Corp.*, *supra*, 23 Env't Rep. Cases (BNA) at 1985.

continuing or episodic nature of violations, or of compliance, is not necessarily apparent from DMRs.

The present case illustrates the difficulties inherent in petitioner's interpretation of Section 505(a)(1). Respondents gave notice of their intent to sue on February 29, 1984. Petitioner's violations continued until May 15, 1984, and those May violations were reported in a DMR which was completed by petitioner on June 8, 1984, and presumably filed with EPA several days later. Pet. Br. 19, n. 19. Respondents filed suit almost immediately thereafter on June 15, 1984. Petitioner's compliance with its permit in June 1984 was reported in a DMR which was not filed until sometime in July 1984, after respondents filed this action. Consequently, respondents could not possibly have determined petitioner's post-May 15 compliance status before their complaint was filed.

Furthermore, respondents could not have determined at the time the complaint was filed whether petitioner was continuing to violate its permit. Petitioner admits that, to avoid the absurd result that a company can be sued only if it is violating its permit on the day the complaint is filed, the statute must be read to include the "chronic episodic violator" who has "ongoing intermittent violations." Pet. Br. 16-17, 29, n. 30. Under this standard, even if respondents could somehow have known on June 15 that petitioner had not violated its permit for the prior 30 days, a single month's compliance would not show whether petitioner was a "chronic episodic violator." At that time, there was no assurance that violations would not be reported in subsequent months. To eliminate the possibility that petitioner's violations were "ongoing intermittent" ones, respondents would have had to have been clairvoyant and predicted the company's future discharges months in advance.

Furthermore, we submit that the facts in petitioner's case are relatively easy to analyze, since it monitored its discharge three times a week and reported those results on a monthly basis. As we have noted above, some dischargers monitor only monthly and report only quarterly. How does a citizen identify a "chronic

episodic violator" when reporting data is this infrequent? How long should a citizen wait to determine whether past intermittent violations have "completely abated" or are "ongoing"? One quarter? One year? And, even if the citizen waits one year, how does he still know whether the violations have ended after the last reporting data which is publicly available?

The court decisions which have required a continuing violation similarly demonstrate the difficulty of defining and implementing that concept. For example, petitioner cites *Sierra Club* v. *Kerr-McGee Corp.*, *supra*, as a case that correctly applied its interpretation of the Act. Pet. Br. 17. In *Kerr-McGee*, plaintiffs filed suit on June 29, 1984 (23 Env't Rep. Cases (BNA) at 1689), and submitted evidence of permit violations from December 1980 through July 1984 (*id.* at 1686). The court held that violations prior to January 3, 1984, were not continuing or actionable, but that those between January 3 and July 24, 1984, were continuing and actionable, even though the latter set of violations were intermittent and did not include a violation on the day the suit was filed. *Id.* at 1690 and n. 3. Indeed, in the latter set, the permit violations closest to the June 29 date of the complaint were on May 22 and July 24. *Ibid.* If two violations in three months mean that those violations "continue unabated," as petitioner argues (Pet. Br. 17), it is difficult to give any clear meaning to these terms.

Furthermore, it is impossible to see "a profound difference" (Pet. Br. 17) between the facts in petitioner's case and the facts in *Kerr-McGee*. In 1984, petitioner reported 10 violations in January, 6 in February, 1 in March, 4 in April, 2 in May, and none in June or July. 611 F. Supp. at 1566. The complaint was filed in June. In that same year, Kerr-McGee reported violations on 6 days in January, none in February, 1 day in March, 2 days in April, 2 days in May, none in June and 1 day in July. 23 Env't Rep. Cases (BNA) at 1690, n. 3. Again, the complaint was filed in June. *Thus, during the same seven month period, each company reported violations in five months, and plaintiff's complaint in each case was filed in the same month.* Yet, according to

petitioner, in one case jurisdiction should be sustained and in the other it should be rejected. Pet. Br. 17-18.

We submit that petitioner's interpretation is not only unreasonable and unworkable, but directly contrary to the intent of Congress. Congress recognized that the successful operation of the Act's citizen suit provision depends on the timely disclosure of a polluter's discharge information. The Senate Report states (S. Rep. No. 414, *supra*, pp. 62, 81):

> A necessary adjunct to the establishment of effective water pollution requirements and the enforcement of such requirements is authority to require information, data, and reports, as well as to establish monitoring requirements.
>
> * * *
>
> The information and other disclosure provisions required throughout this bill are important to the operation of this provision. The Administrator would have a special duty to make meaningful information on discharging sources available to the public on a timely basis.

Congress also recognized that enforcement actions based on such information should be simple and expeditious. Thus, the Senate Report states (*id.* at 64, 65, 80, 81):

> [T]he bill reported from the Committee establishes and makes *precise new requirements* imposed on persons and subject to enforcement. One purpose of these requirements is to *avoid the necessity of lengthy fact finding, investigations*, and negotiations at the time of enforcement. Enforcement of violations of requirements of this Act should be based on a *minimum of discretionary decisionmaking or delay*.
>
> * * *
>
> The Committee believes that if the timetables established throughout the Act are to be met, the threat of sanctions must be real, and *enforcement provisions must be swift and direct*.
>
> * * *
>
> An alleged violation of an effluent control limitation or standard would not require reanalysis of technological

> [or] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the provisions. Therefore, an *objective evidentiary standard* will have to be met by any citizen who brings an action under this section.
>
> * * *
>
> The standards for which enforcement would be sought under either administrative enforcement or through citizen enforcement procedures are the same. * * * Consequently, the factual basis for enforcement of requirements would be available at the time enforcement is sought and the issue before the courts would be a factual one of *whether there had been compliance*.
>
> * * *
>
> The citizen suit provision is consistent with principles underlying the Federal Water Pollution Control Act, that is the development of *clear and identifiable requirements*. Such requirements should provide *manageable and precise benchmarks for enforcement*. [emphases added]

Petitioner's interpretation is directly inconsistent with this legislative intent. It would engage the litigants in discovery battles over whether a discharge is continuing and would engage the courts in a search for standards to apply in resolving the continuing discharge issue. Such standards would not be "manageable" or "precise," would require "lengthy fact finding, [and] investigations," and would prevent the enforcement provisions from being based on "a minimum of discretionary decisionmaking or delay."

Aside from petitioner's proposed standard, the other standards suggested by the court decisions relied on by petitioner are equally inconsistent with Congressional intent. The Fifth Circuit's test in *Hamker* v. *Diamond Shamrock Chemical Co.*, *supra*, 756 F.2d at 395, *i.e.*, whether a violation occurs on the date the complaint is filed, is hopelessly unrealistic given the practicalities of how infrequently and how slowly permittees monitor and report the pollutants in their discharges. Citizen plaintiffs could not know in advance the day on which monitoring would occur. It would be an unusual coincidence if monitoring even happened to occur on the day the complaint was filed.

In *Pawtuxet Cove Marina* v. *Ciba-Geigy Corp.*, *supra*, 807 F.2d at 1093, the First Circuit attempted to draw a line between "conduct indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one." In drawing this line, the court directed the district courts to "consider, among other things, the isolated or recurrent nature of the infraction, the degree of scienter on the part of the defendant, and the sincerity of its assurances against future violations." *Id.* at 1094. This test is quintessentially discretionary and imprecise. Moreover, it confuses the traditional standards for an injunction based on the likelihood of recurring violations with the totally different question whether the defendant should be penalized because violations have already occurred. Finally, by examining the defendant's degree of scienter and "sincerity," that test is directly inconsistent with the principle that polluters are strictly liable for permit violations, regardless of their good faith. *United States* v. *Earth Sciences, Inc.*, *supra*, 599 F.2d at 374.

F. CIVIL PENALTIES FOR PAST VIOLATIONS ARE ESSENTIAL TO CARRY OUT THE STATUTORY PURPOSE OF DETERRING VIOLATIONS BY PETITIONER AND OTHER POLLUTERS

Petitioner argues that the primary goal of the Act is to encourage permit compliance and that, once compliance is achieved, no further citizen action is necessary. Pet. Br. 25-26. This argument seriously misapprehends the purpose of the statute.

The whole purpose of the civil penalty provision is to induce timely and voluntary compliance. Penalties serve to deter violations both by the violator ("specific deterrence") and by other polluters ("general deterrence"). EPA has emphasized these points in its policy statement on enforcement of civil penalties (U.S. Environmental Protection Agency, Policy on Civil Penalties, EPA General Enforcement Policy GM-21 (Feb. 16, 1984),

pp. 3-4, reprinted in Env't Rep. (BNA) (Fed. Laws) 41:2991-3003):

> The first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence).
>
> • • •
>
> If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. • • • For these reasons, it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law.
>
> • • •
>
> The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation [the "gravity component"]. In doing so, the penalty will be perceived as fair. In addition the penalty's size will tend to deter other potential violators.
>
> In some classes of cases, the normal gravity calculation may be insufficient to effect general deterrence. This could happen if, for example, there was extensive noncompliance with certain regulatory programs in specific areas of the United States. This would demonstrate that the normal penalty assessments had not been achieving general deterrence. In such cases, the case development team should consider increasing the gravity component sufficient to achieve general deterrence.

EPA has emphasized in its policy statements that achievement of these goals of specific and general deterrence requires the imposition of civil penalties even if the violator has come into compliance (U.S. Environmental Protection Agency, Agency-wide Compliance and Enforcement Strategy and Strategy

Framework for EPA Compliance Programs (May 1984), p. 26, quoted in *SPIRG* v. *AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1201, n.4):

> Civil penalty actions are often necessary even if the underlying violation has been corrected, to deter future violations, and to restore economic equity to other regulated parties which have invested the resources needed to be in compliance all along.

Thus, EPA has clearly stated that penalties for past violations, even when the violations have ceased, are essential to carry out the purpose of the statute. EPA's interpretation of the Act "is entitled to considerable deference" by this Court. *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council*, 470 U.S. 116, 125 (1985).

Furthermore, Congress expressly mandated that all permittees comply with their permits by July 1, 1977. 33 U.S.C. 1311(b)(1). Petitioner was out of compliance with its permit until May 1984. While petitioner claims that it made substantial investments to achieve compliance by this date (Pet. Br. 4-6), it delayed that investment for years and therefore gained a large economic benefit. A failure to impose civil penalties in such cases would encourage other companies to delay their compliance with the Water Act.

Indeed, petitioner's argument that penalties are not available unless the permittee is currently "in violation" would encourage permittees to do nothing until they were notified that a suit was imminent. If the company then came into compliance before suit was brought, it would totally escape any penalty for its violation of the statute. Such a result would seriously undermine the deterrent purpose of the statute. See, *e.g.*, *Sierra Club* v. *Hanna Furnace Corp.*, *supra*, 636 F. Supp. at 529.

The fact that petitioner is no longer violating its permit does not mean that civil penalties will have no deterrent effect on petitioner in the future. Petitioner's NPDES permit is still in full force and effect, and petitioner is still discharging into the Pagan River. Pet. Br. 21. Petitioner may still violate its permit. It

therefore serves the deterrent purpose of the Act for petitioner to know that it cannot escape liability for any future permit violations by again halting the violations before a complaint is filed in federal court. *SPIRG* v. *AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1200.

Furthermore, penalizing petitioner for its past noncompliance in this case will deter other polluters. Such polluters will have greater incentive to comply quickly with their permits if they know they can be sued for past violations, even if they cease discharging or come into compliance before they are sued. On the other hand, if, as petitioner proposes, polluters can retain an economic advantage from years of noncompliance and escape any consequences for its permit violations, there would be a substantial disincentive to voluntary compliance.

G. PERMITTING CITIZEN SUITS BASED ON PAST VIOLATIONS WILL NOT HAVE THE ADVERSE EFFECTS ALLEGED BY PETITIONER

Petitioner argues that permitting citizens to sue for past violations would have serious adverse effects, *i.e.*, burdening the federal courts with a flood of citizen suits, providing an incentive for citizens to obtain settlements benefitting environmental organizations rather than the U.S. Treasury, interfering with governmental enforcement activities, and raising serious constitutional issues. Pet. Br. 30-37. These arguments are specious at worst and diversionary at best.

On the one hand, these arguments prove too much. All of them might support an argument that citizen plaintiffs should not be allowed to sue for penalties at all. However, this is an argument which Congress has obviously not accepted since it explicitly provided that citizens could sue for the imposition of penalties. On the other hand, these arguments prove too little. Not one of them supports petitioner's position that citizen suits for penalties relating to continuing violations are authorized, but identical suits based on past violations are not.

Petitioner claims that citizen suits under the Water Act will burden the federal courts. Pet. Br. 33. Petitioner speculates that, since there are 65,000 outstanding permits, every one of these is potentially the subject of a citizen suit, because EPA writes every permit with the statistical expectation that 100 percent compliance is impossible. *Id.* at 34.[5]

The short answer to petitioner's *in terrorem* argument is that we know of no suit brought by a citizen plaintiff for one or even a few routine violations of an NPDES permit, and petitioner cites none. The reason is undoubtedly because such a suit is extremely unlikely to succeed. First, in cases where violations are random and infrequent, there is reason to expect the permittee to invoke the "upset" defense in EPA's regulations, which, when incorporated in the permit, provide an affirmative defense for exceptional incidents in which there is temporary and unintentional noncompliance with technology-based limits because of factors beyond the reasonable control of the permittee. 40 C.F.R. 122.41(n). Second, when few violations are involved, the courts are not likely to impose significant penalties, since they must consider the history and seriousness of the violations in setting a penalty. 33 U.S.C. 1319(d), as amended, 101 Stat. 45.

Petitioner also argues that allowing citizens to sue for past violations will encourage citizens to use the citizen suit provision

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5. EPA's decision to write permits in this way is perfectly reasonable. If EPA drafted a permit to encompass all the potential statistical variability in a company's discharge, it would have to set the permit limits so high as to be meaningless as a regulatory control device. "One of the goals of the NPDES permit program is to insure that pollution-control facilities are operated as efficiently and carefully as possible." *U.S. Steel Corp.* v. *Train*, 556 F.2d 822, 842 (7th Cir. 1977). The limits therefore should not be set so high as to "build in a factor for human or mechanical lapses." *Ibid.* Accord, *CPC International* v. *Train*, 540 F.2d 1329, 1337-1338 (8th Cir. 1976); *American Petroleum Institute* v. *EPA*, 540 F.2d 1023, 1036 (10th Cir. 1976)("As technology for control of pollutant discharges improves, the variations should lessen").

Despite its theoretical statistical expectation that 100% compliance may be impossible, EPA actual regulatory expectation is that 100% compliance is achievable by all permittees. Thus, EPA's regulations provide that permittees must comply with their permits at all times and that any permit violation is a violation of the Water Act. 40 C.F.R. 122.41(a).

to extract environmental contributions from defendants in lieu of the payment of civil penalties to the U.S. Treasury. Pet. Br. 30-32. However, such environmental contributions are neither illegal nor improper. They were first approved as a remedial option in EPA's 1980 civil penalty policy.[6] In its 1984 civil penalty policy, EPA stated that "the Agency has accepted various environmentally beneficial expenditures in settlement of a case and chosen not to pursue more severe penalties."[7] The Justice Department has followed this practice in its own enforcement actions under the Act.[8] Most recently, environmental contributions were expressly endorsed in the Conference Report on the Senate bill which became the 1987 amendments to the Water Act (H. Rep. No. 1004, 99th Cong., 2d Sess. 139 (1986)):

> In certain instances settlements of fines and penalties levied due to NPDES permit and other violations have been used to fund research, development and other related projects which further the goals of the Act. In these cases, the funds collected in connection with these violations were used to investigate pollution problems other than those leading to the violation. Settlements of this type preserve the punitive nature of enforcement actions while putting the funds collected to use on behalf of environmental protection. Although this practice has been used on a selective basis, *the conferees encourage this procedure where appropriate.* [emphasis added]

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6. EPA Civil Penalty Policy For Major Source Violators of Clean Air Act and Clean Water Act (July 8, 1980), Env't Rep. (BNA) (Fed. Laws) 41:1101, 1106.

7. EPA Civil Penalty Policy (Feb. 16, 1984), reprinted in Env't Rep. (BNA) (Fed. Laws) 41:2991, 3002. In its 1986 civil penalty policy, EPA again authorized such environmental contributions, but stated that "[t]he government should continue to consider mitigation projects as the exception rather than the rule." U.S. Environmental Protection Agency, Clean Water Act, Penalty Policy for Civil Settlement Negotiations, February 11, 1986.

8. See, *e.g.*, *United States* v. *Amoco Oil Co.*, Civil No. 80 0801 (W.D. Mo. 1984) (consent decree requiring $350,000 civil penalty to the United States and $150,000 contribution "to an organization or organizations operating in the State of Missouri designated by defendant for use on any project relating to hazardous waste"), discussed in 15 Env't Rep. (BNA) (Current Developments) 686 (Aug. 31, 1984).

Thus, both Congress and the executive branch have sanctioned environmental contributions in appropriate cases.[9]

Petitioner further argues that permitting citizens to sue for past violations interferes with the enforcement authority of EPA and the States under the Act. Pet. Br. 35-36. However, the United States has strongly taken the position that the citizen suit provision assists the enforcement authority of the executive branch. Thus, in a *amicus* brief filed in a citizen suit under the Act, the United States stated:[10]

> The United States considers the Section 505 "citizen suit" provisions a valuable adjunct to federal enforcement of the Clean Water Act. The provisions, responsibly invoked, provide a useful supplement to federal and state enforcement resources and a strong deterrent to future violations.

Similarly, as we have noted above (p. 3), the Senate Report on the 1987 amendments states that citizen suits are operating "as Congress intended—to both spur and [as a] supplement to government enforcement actions." S. Rep. No. 50, *supra*, p. 28. In short, petitioner's argument has already been rejected by both Congress and the executive branch.

Finally, petitioner and several supporting *amici* suggest that the lower court's interpretation of Section 505 would raise constitutional problems. Pet. Br. 37, n. 48. They argue that penalties paid to the government for past violations cannot redress any injury to plaintiffs and that suits to recover such penalties therefore contravene the standing requirements of Article III. *Ibid.* They also argue that allowing citizens to seek such penalties

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9. To the extent that environmental contributions might be misused as a remedial option, there are adequate safeguards in the statute. First, all proposed consent decrees must be submitted to the Justice Department and EPA for review before they can be entered by a court. 33 U.S.C. 1365(c)(3), as amended, 101 Stat. 75. Second, the United States is not bound by citizen suit settlements and could seek the maximum statutory penalty for the same violations. 133 Cong. Rec. S 737 (daily ed., Jan 14, 1987) (remarks of Sen. Chafee).

10. Brief of the United States as Amicus Curiae in Support of the Constitutionality of Section 505 of the Clean Water Act, pp. 1-2, filed in *SPIRG* v. *Monsanto Co.*, 600 F. Supp. 1474 (D.N.J. 1985).

violates the separation of powers doctrine by vesting enforcement authority in citizens unaccountable to the electorate rather than in the executive branch. *Ibid.*

Both of these arguments have been squarely addressed and rejected by the lower courts. As to standing, the court in *SPIRG* v. *AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1200-1202, held that plaintiffs' members will benefit personally from imposition of civil penalties for purely past violations because the defendant would be specifically deterred from violating its permit in the future and other dischargers into the same waterway would be generally deterred from violating their permits in the future as well.

As to separation of powers, two district courts have found no constitutional infirmity with Section 505 on this ground. *SPIRG* v. *Monsanto Co.*, *supra*, 600 F. Supp. at 1478-1479; *Chesapeake Bay Foundation* v. *Bethlehem Steel Corp.*, 652 F. Supp. 620 (D. Md. 1987). The cases cited by the *amici* on this issue do not support their argument. In each of those cases, Congress attempted to deny authority to other branches of the federal government to exercise their constitutionally-allocated functions, and to grant such authority to persons not constitutionally permitted to exercise it.[11]

Citizen suits have neither of these features. First, they do not deny or limit the Executive's power to enforce the law. On the contrary, that power is specifically preserved by the numerous government oversight mechanisms in Section 505—advance notification of citizen suits, receipt of complaints, review of consent

11. Thus, in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and *Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986), the Court held that Congress had unconstitutionally retained for itself the power to appoint (or remove) those charged with enforcing the laws it passed. In *Buckley*, Congress vested enforcement authority in a commission composed of eight members, four of whom were appointed by Congress. In *Bowsher*, Congress delegated to the Comptroller General, an official dismissable only by Congress, the power to designate mandatory cuts in the federal budget. In *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court held that Congress had unconstitutionally circumvented the Judicial Branch by assigning all bankruptcy authority to a non-Article III court. Thus, in all three of these cases, governmental power was shifted from its rightful possessor to a person not entitled to have it.

decrees, preemption of such suits by prior government suits, and intervention as of right. 33 U.S.C. 1365.

In *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1941), this Court upheld the constitutionality of a *qui tam* statute which provided citizens with far broader prosecutorial discretion than does the Water Act. The False Claims Act, as then in force, entitled the *qui tam* plaintiff to prosecute frauds committed against the federal government and retain one-half of the penalty collected. Act of March 2, 1863, 12 Stat. 696, 698, 31 U.S.C. 231-234 (1940).[12] That statute did not provide for any of the government oversight mechanisms in the Water Act. It therefore follows *a fortiori* that a statute such as the Water Act, which grants much more extensive protection to executive branch enforcement interests than do *qui tam* statutes, is constitutional.

Second, the citizen suit provision does not grant enforcement authority to a person not constitutionally authorized to exercise it. This Court recognized in *Davis* v. *Passman*, 442 U.S. 228, 241 (1979), that:

> Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating rights and obligations, to determine in addition who may enforce them and in what manner.

See also *Tigner* v. *Texas*, 310 U.S. 141, 148 (1940). It is therefore constitutionally permissible for Congress to create a cause of action for private citizens to remedy and prevent pollution of this nation's waterways.

The fact that citizens can recover civil penalties in such actions does not change this conclusion. Congress has frequently authorized private citizens to pursue actions for civil penalties. See,

---

12. *Qui tam* statutes empower private citizens to sue for penalties owed to the government as a result of another's unlawful conduct. As a reward for assisting in the enforcement of the law, the *qui tam* plaintiff is entitled to a share of the penalty. See Note, *The History and Development of Qui Tam*, 1972 Wash. U. L.Q. 81. *Qui tam* actions "have been in existence for hundreds of years in England and in this country ever since the foundation of our Government." *Marvin* v. *Trout*, 199 U.S. 212, 225 (1905). See also *Adams qui tam* v. Woods, 6 U.S. (2 Cranch) 336 (1804).

e.g., False Claims Act, 31 U.S.C. 3730(b); Patent Act of 1952, 35 U.S.C. 292. In addition, in seeking such penalties, citizens are vindicating their own rights, not exercising governmental enforcement power. Under Section 505, a person "having an interest which is or may be adversely affected" (33 U.S.C. 1365(g)) by a defendant's unlawful pollution sues "on his own behalf" (33 U.S.C. 1365(a)) to remedy and prevent that pollution. It is therefore constitutional for Congress to authorize the judicial assessment of civil penalties as part of a package of remedies designed to afford complete relief and maximum deterrent effect against polluters.

CONCLUSION

For these reasons, the judgment below should be affirmed.

Respectfully submitted,

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GWALTNEY OF SMITHFIELD, LTD.

Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.

and

NATURAL RESOURCES DEFENSE COUNCIL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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STATEMENT OF INTEREST

The amici states submit this brief in support of respondents Chesapeake Bay Foundation, Inc. and Natural Resources Defense Council. Except for New Mexico and Maine, the amici states regulate discharges of pollutants to navigable waters within state boundaries through their National Pollutant Discharge Elimination System ("NPDES") permit licensing programs. These permit programs have been approved by the Administrator of the United States Environmental Protection Agency ("EPA") pursuant to section 402 of the Clean Water Act (33 U.S.C. § 1342).[1] An NPDES permit, through the establishment of effluent limitations, limits the type and quantity of pollutants discharged to navigable waters.

The amici states rely on the citizen suit provision of the Clean Water Act (section 505(a)) in seeking civil penalties against federal facilities which have violated the effluent limitations in their NPDES permits.[2] Further,

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1. The Clean Water Act (33 U.S.C. § 1251 et seq.) was officially entitled "the Federal Water Pollution Control Act" until it was amended in 1977. For brevity purposes the Federal Water Pollution Control Act and the Clean Water Act will be referred to herein as the Clean Water Act or the Act. The Clean Water Act was recently amended by the Water Quality Act of 1987. Pub.L. 100-4, 101 Stat.7. These amendments will be referred to herein as the Water Quality Act of 1987.

All section references herein are to the Clean Water Act unless otherwise indicated.

2. Federal facilities are considered among the nation's worst polluters. S.Rep. No. 414, 92d Cong., 1st Sess. 80 (1971); Goldman, Cleaning Up the Federal Polluters: Tax-Supported Toxic Waste, 239 Nation 550, Nov. 24, 1984. Thus, the United States has the same incentive as petitioner and industry amici herein to limit the application of section 505(a). Therefore, the views expressed by the United States in this case regarding the proper interpretation of section 505(a) are those of a discharger, not simply those of a regulator.

some states rely on section 505(a) (33 U.S.C. § 1365(a)) in seeking civil penalties against private dischargers. As explained below, civil penalties are an important means of compelling compliance with the Clean Water Act. Thus, amici states have a strong interest in being able to seek civil penalties under section 505(a) for past violations.

SUMMARY OF ARGUMENT

State amici believe the Fourth Circuit correctly decided the case below for several reasons.

First, section 505(a) incorporates by reference section 309(d) of the Clean Water Act (33 U.S.C. § 1319(d)), which has been interpreted by the courts to allow penalties for past violations. Second, the legislative history of the Clean Water Act makes clear that the rights of citizens under section 505(a) are coextensive with the rights of the EPA Administrator, who can undoubtedly seek civil penalties under section 309(d) for past violations. Third, the legislative history of the Clean Water Act removes any doubt that civil penalties may be imposed under section 505(a) for past violations. Fourth, the "alleged to be in violation" language in section 505(a) does not limit civil penalties to ongoing violations.

Petitioner and industry amici believe section 505 should be interpreted narrowly. They argue that the "alleged to be in violation" language in section 505(a) must be read literally, but they suggest a jurisdictional test that departs from such a literal interpretation. As we will explain below, if section 505(a) is read literally, it can have only one of two meanings. Either civil penalties are authorized for past violations, or civil penalties are authorized only for violations that are occurring at

the precise moment that a citizen suit is filed. As will be evident, the language of the Clean Water Act and its legislative history indicate that only the first reading is correct.

Petitioner and industry amici also make several policy arguments for a restrictive interpretation of section 505(a). If, as they contend, the citizen suit provision is subject to abuse, it is a problem appropriately remedied by Congressional action and, to date, Congress has not indicated that it shares petitioner's and industry amici's view of citizen suits. Petitioner and industry amici also argue that civil penalties for past violations do not further the purpose of the Clean Water Act, but this assertion ignores the deterrent value of civil penalties.

ARGUMENT

I

CITIZENS SUING UNDER THE CLEAN WATER ACT MAY SEEK CIVIL PENALTIES FOR PAST VIOLATIONS

A. Under Clean Water Act Section 309(d) Citizens Can Seek Civil Penalties For Past Violations.

Section 505(a) authorizes any citizen to commence a civil action against any person "who is alleged to be in violation" of an effluent standard or limitation. Under section 505(a), the district court may grant injunctive relief, and also may impose any appropriate civil penalties under section 309(d) of the Clean Water Act.[3] Thus, in

3. Section 309(d) provides that any person who violates specified sections of the Clean Water Act or any permit condition or limitation implementing any of such sections in an NPDES permit issued by the EPA Administrator or by a state shall be subject to a civil penalty not to exceed $25,000 per day of such violations. When the Clean Water Act was amended by the Water Quality Act of 1987, civil penalties were raised from $10,000 to $25,000 per day.

effect, penalties provided in section 309(d) are incorporated by reference into section 505(a).

Under section 309(d), the EPA Administrator can seek civil penalties for past violations. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375-76 (10th Cir. 1979); *United States v. Detrex Chemical Industries, Inc.*, 393 F. Supp. 735 (N.D. Ohio 1975); *SPIRG v. AT & T Bell Laboratories*, 617 F.Supp. 1190, 1197 (D.N.J. 1985); *SPIRG v. Monsanto Co.*, 600 F.Supp. 1474, 1476 (D.N.J. 1985); *Tull v. U.S.*, 55 U.S.L.W. 4571, — U.S. — (April 28, 1987). Since section 309(d) is incorporated by reference into section 505(a), citizens necessarily have the same right as the EPA Administrator to seek penalties for past violations. If section 505(a) were interpreted narrowly to disallow citizen suits for past violations, section 309(d) would be interpreted differently depending on whether the penalty action is brought by the Administrator or a citizen. Nothing in the Act or its legislative history indicates Congress intended such an illogical result. Had Congress intended to limit imposition of civil penalties in citizen suits to ongoing violations, it would have expressly limited the application of section 309(d) or omitted any reference to section 309(d) penalties in section 505(a).

The legislative history of the Clean Water Act supports a finding that citizens have comparable enforcement authority to that of the EPA Administrator. The Senate Report states:

> "It should be noted that if the Federal, State and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action under the citizen suit provision of section 505." S.Rep. No. 414, 92d Cong., 1st Sess. 64 (1971).

The Senate Report further states:

> "The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same. Therefore, the participation of citizens in the courts seeking enforcement of water pollution control requirements should not result in inconsistent policy." *Id.* at 80.

In describing the Conference Report accompanying the Clean Water Act bill in 1972, Senator Muskie, the principal author of the Senate bill, emphasized the coextensive nature of EPA and citizen suit enforcement authority:[4]

> "The Administrator's authority is not limited to those cases in which there is a continuing violation. Any discharge, intermittent or continuous, which the Administrator finds violates the terms of the permit, is to be enforced . . . Citizen suits can be brought to enforce against both continuous and intermittent violations." 118 Cong. Rec. 33693 (1972).

The importance of citizen suits as a complementary enforcement tool to EPA action was noted by the Senate in considering the recent amendments to the Clean Water Act. The Senate Committee on Environment and Public Works concluded that:

> "Citizen suits are a proven enforcement tool. They operate as Congress intended to both spur and supplement government enforcement actions. They have deterred violators and have achieved significant compliance gains." S.Rep. No. 50, 99th Cong., 1st Sess. 28 (1985).

Thus, the legislative history of the Clean Water Act and the recent amendments to the Act indicates that citizens

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4. In *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129 (1977), Justice Stevens called Muskie "perhaps the Act's primary author", and quoted Muskie's remarks extensively to support the Court's opinion.

share the same authority as the EPA Administrator to seek civil penalties for past violations.[5]

In summary, since the district court in a citizen suit is authorized to impose any appropriate civil penalties under section 309(d) and the EPA Administrator is authorized to sue for past violations under section 309(d), citizens must also have the same authority. Otherwise, section 309(d) would be interpreted differently depending on whether the suit is brought by the EPA Administrator or a citizen.

B. The Legislative History of the Clean Water Act Supports Imposition of Penalties for Past Violations Under Section 505.

The legislative history of the Clean Water Act unequivocally demonstrates that section 505(a) authorizes civil penalties for past violations, even if those past violations have not continued to the present. Senator Muskie, in submitting the Conference Report to the Senate in 1972, explained the citizen suit provision as follows:

> "The Conferees accepted a provision requiring that citizens seeking to bring an action give appropriate notice and wait 60 days before filing suit and to give the appropriate administrative agencies a chance to act.
>
> "This 60-day provision was not intended, however, to cut off the right of action a citizen may have to violations that took place 60 days earlier but which may not have been continuous. As in the original

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5. Several district courts have opined that "the remedies obtainable in citizen suits should be coextensive with those available in suits initiated by the federal government." *Connecticut Fund for the Environment v. the Job Plating Co., Inc.*, 623 F.Supp. 207, 213 (D. Conn. 1985). Accord, *SPIRG v. Georgia-Pacific Corp.*, 615 F.Supp. 1419, 1425 (D. N.J. 1985); *SPIRG v. Monsanto Co., supra*, 600 F.Supp. at 1476-1477; *SPIRG v. AT&T Bell Laboratories, supra*, 617 F.Supp. at 1199.

> Senate bill, a citizen has a right under section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be, *or to have been*, in violation, whether the violation be a continuous one, *or an occasional or sporadic one.*" 118 Cong. Rec. 33700, *supra* (statement of Sen. Muskie), 1 *Leg. Hist.* 179 (emphasis added).

Senator Muskie's statement that a citizen suit may be brought when a person is "alleged to be, or to have been, in violation" of the Clean Water Act leaves no doubt that civil penalties may be sought under section 505(a) for past violations.

The legislative history of the 1987 amendments to the Clean Water Act also makes clear that citizens can obtain civil penalties for past violations. In the Senate Report discussing the preclusive effect of the new administrative civil penalty proceedings on citizen suits, it was stated that this preclusive effect:

> "would not apply to an action for civil penalties for a violation of the same requirement of the act that is not being addressed administratively or *for a past violation* of another pollutant parameter (even one resulting from the same discharge which is the subject of the administrative civil penalty proceeding)." S.Rep. No. 50, *supra*, at 28 (emphasis added).

Thus, the Senate Report accompanying the 1987 Clean Water Act amendments acknowledges a citizen's right to seek civil penalties for past violations.

Significantly, nothing in the legislative history of the Clean Water Act or the 1987 amendments supports the view of petitioner and industry amici that civil penalties may only be imposed for ongoing violations. Petitioner cites several passages from the Senate Report and the hearing record which refer to citizen suits as a useful tool to abate violations. Pet. Br. 26-27. Upon reviewing the context in which these statements were made, it becomes clear that Congress was addressing the circumstances re-

quired for obtaining injunctive relief and not addressing the circumstances when civil penalties might be appropriate. Indeed, when Congress focused on the circumstances when civil penalties were appropriate, the principal author of the Senate bill stated that a citizen can sue "any person who is alleged to be, or *to have been*, in violation" of the Clean Water Act. 118 Cong. Rec. 33700, *supra* (statement of Senator Muskie), 1 Leg. Hist. 179 (emphasis added).

C. The "Alleged To Be In Violation" Language In Section 505(a) Does Not Limit Penalties to Ongoing Violations.

Petitioner and industry amici argue that the "alleged to be in violation" language in section 505(a) limits civil penalties to ongoing violations. For several reasons, this argument is unconvincing. As explained above, citizens possess the same authority to seek civil penalties for past violations as does the EPA Administrator because section 309(d) is incorporated by reference into section 505(a). Further, the above described legislative history of the Clean Water Act makes clear that citizens can seek civil penalties for past violations.

As we will now explain, the 1987 amendments to section 309 of the Clean Water Act also demonstrate that Congress did not intend the use of the present tense in section 505(a) to limit the imposition of civil penalties to ongoing violations. In section 309(g), which was added in 1987, Congress alternated between the past and present tense in describing the authority of the EPA Administrator and the Secretary of the Army to impose civil penalties administratively for violations of the Clean Water Act.[6]

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6. Section 309 as amended by section 314 of the Water Quality Act of 1987 provides in part:

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Sections 309(g)(1)(A) and (B) allow the Secretary of the Army or the EPA Administrator to impose penalties when

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"(1) Violations.—Whenever on the basis of any information available—

(A) the Administrator finds that any person *has violated* section 301, 302, 306, 307, 308, 318, or 405 of this Act, or has violated any permit condition, or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or in a permit issued under section 404 by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the 'Secretary') finds that any person has violated any permit condition or limitation in a permit issued under section 404 of this Act by the Secretary, the Administrator or Secretary, as the case may be, may, after consultation with the State in which the *violation occurs*, assess a class I civil penalty or a class II civil penalty under this subsection.

"(2) Classes of Penalties.—

(A) Class I.—The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of title 5, United States Code, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II.—The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the *violation continues;* except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of title 5, United States Code. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph." (Emphasis added.)

"any person *has violated*" certain provisions of the Act. (Emphasis added.) However, the Secretary or Administrator may only assess the penalty after consulting "with the State in which the *violation occurs.*" (Emphasis added.) Further, with regard to class II civil penalties, section 309(g)(2)(B) states the amount "may not exceed $10,000 per day for each day during which the *violation continues.*" (Emphasis added.)

If the present tense language in sections 309(g)(1) and (g)(2) was interpreted narrowly as petitioner and industry amici interpret the phrase "alleged to be in violation" in section 505(a), the Administrator and the Secretary of Army could not recover civil penalties for past violations. However, federal officials can indeed recover civil penalties for past violations under section 309(g). The Senate Report discussing the authorities of the United States under section 309(g) states as follows:

> "This new authority is designed to address past, rather than continuing violations of the Act. Continuing violations are more appropriately addressed by abatement orders or injunctive actions and, if EPA seeks both civil penalties and injunctive relief, one judicial action should be filed." S.Rep. No. 50, *supra*, at 26.

Thus, the alternating use of present and past tense in section 309(g) indicates that Congress did not intend to draw distinctions between past and present violations in authorizing citizens to seek civil penalties under section 505(a).

Moreover, the legislative history of section 309(g) also makes clear that Congress did not intend the "alleged to be in violation" language in section 505(a) to limit civil penalties to ongoing violations. Significantly, the U.S. House of Representatives used a phrase virtually

identical to the language at issue in this case in describing the Administrator's authority to impose administrative civil penalties under section 309(g). The report on the House bill amending the Clean Water Act states in pertinent part as follows:

> "The amendment authorizes the assessment of administrative civil penalties for violations of the Act. Whenever on the basis of any information available to him the Administrator finds that any person *is in violation* of section 301 (except with respect to a violation of section 404); 302, 306, 307, 318 or 405 of the Act or *is in violation* of any permit condition or limitation implementing any of these sections in a permit issued under section 402 of the Act, he may, after consultation with the state in which the violation occurs, assess a civil penalty of not more than $10,000 per day of violation, except that the penalty shall not exceed a total of $125,000." H. Rep. No. 1004, 99th Cong., 2d Sess. 135 (1986) (emphasis added).

As noted above, the legislative history of section 309(g) makes clear that the EPA Administrator and the Secretary of the Army have authority to seek administrative civil penalties for past violations. Since Congress did not intend to limit civil penalties under section 309(g) to ongoing violations by using the phrase "is in violation," it could not have intended that the virtually identical language in section 505(a) limit civil penalties to ongoing violations.[7]

In summary, the legislative history of the 1987 amendments and Congress' alternating use of the past and pres-

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7. Under the Clean Air Act, which employs language similar to the present tense language in section 505(a), the EPA Administrator has authority to seek penalties for past violations. *United States v. Chevron U.S.A. Inc.*, 639 F.Supp. 770 (W.D.Tex. 1985) The Clean Air Act provides that the EPA Administrator may bring an action for civil penalties based upon a finding that "any person is in violation" of requirements of the Act. 42 U.S.C. § 7413.

ent tense in section 309(g) further demonstrate that Congress did not intend that its use of the phrase "alleged to be in violation" in section 505(a) limit civil penalties to ongoing violations.

In *SPIRG v. Monsanto Co., supra,* 600 F.Supp. at 1476, the court held that "a plausible construction of the language [in section 505(a)] is that one is 'in violation' and continues to be 'in violation' by having 'violated' ". Such a construction of section 505(a) is particularly appropriate because of the nature of pollution violations. The harm caused by a violation of an effluent limitation is not confined to the day of discharge. Rather, the pollutants harm aquatic life and humans for many years. The immediate effects of an illegal discharge may be the closing of waters to swimming and fishing or the death of aquatic life. But the long term effects of such a discharge can also be serious, especially if the toxic substances are bioaccumulated in shellfish and other organisms that are consumed by humans. In addition, the cumulative effect of numerous violations of effluent limitations may be to limit beneficial uses of a water body. Thus, because of the nature of pollution violations, the phrase "alleged to be in violation" is appropriately construed to include past violations of the Clean Water Act.

Further, to interpret section 505(a) to allow civil penalties only for ongoing violations would be illogical. Civil penalties, by their very nature, are imposed for past conduct, whether or not the conduct is continuing or threatening to continue. See *SPIRG v. AT & T Bell Laboratories, supra,* 617 F.Supp. at 1198. In that respect, civil penalties are different from prospective relief, such as injunctions, which are imposed for conduct that is continuing or threatening to continue. The fact that conduct is

continuing, or not continuing, may be highly material in determining the *amount* of civil penalties. This fact, however, is immaterial in determining *whether* such penalties can be jurisdictionally imposed.

For the above reasons, the words "alleged to be in violation" in section 505(a) may reasonably be read to include unlawful conduct occurring before a lawsuit is filed as well as unlawful conduct that continues into the present.

D. Petitioner's View of Citizen Suit Jurisdiction Conflicts With Its Own Literal Reading of Section 505(a).

Petitioner and amici argue that section 505(a) should be interpreted literally, but then they advocate a jurisdictional test that departs from this literal approach. If the "alleged to be in violation" language in section 505(a) is read literally, one of two conclusions must be reached. Either no jurisdiction lies unless a violation is occurring on the day suit is filed or jurisdiction lies even if the violation is not ongoing. As we will now explain, only the second reading is correct.

The lower courts have adopted three different interpretations of section 505(a). The Fifth Circuit, in *Hamker v. Diamond Shamrock Chemical Corp.*, 756 F.2d 392, 395 (5th Cir. 1985), held that no civil penalties can be imposed under section 505(a) unless a violation is occurring on the day suit is filed. The Fourth Circuit, in *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 791 F.2d 304, 313 (4th Cir. 1986), held that citizens can seek penalties under section 505(a) for permit violations committed entirely in the past. The First Circuit, in *Pawtuxet Cove Marina Inc. v. Ciba Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986), held that:

> "an action under 33 U.S.C. § 1365 may go forward if the citizen-plaintiff fairly alleges a continuing likeli-

> hood that the defendant, if not enjoined, will again proceed to violate the Act. In reviewing actions under this standard, the district court should consider, among other things, the isolated or recurrent nature of the infraction, the degree of scienter on the part of the defendant, and the sincerity of its assurances against future violations. Cf. *Bonastia*, 614 F.2d at 912. We thus agree with the result in *Hamker v. Diamond Shamrock Chemical Corp.* 756 F.2d 392 (5th Cir. 1985), in which the court held the plaintiff's allegation of a single, past violation to be insufficient. We do not, however, agree with the reasoning which, apparently, led the Louisiana district court, following the *Hamker* decision, to dismiss a number of actions simply because no violations occurred on the dates the complaints were filed. See *Sierra Club v. Copolymer Rubber & Chemical Corp.*, 621 F.Supp. 1013, 1015 (M.D. La. 1985). A plaintiff who makes allegations warranting injunctive relief in good faith, judged objectively, may recover a penalty judgment for past violations even if the injunction proves unobtainable."

The *Pawtuxet* court, in further explaining its interpretation of section 505(a), stated that "the words 'is . . . in violation' should be sufficiently liberally construed to comport with the injunctive purpose of the act—conduct indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one." *Id.* at 1093. Thus, under the *Pawtuxet* approach, a citizen may seek civil penalties under section 505(a) if the plaintiff "alleges a continuing likelihood the defendant, if not enjoined will again proceed to violate the act."

Petitioner and industry amici advocate the Court adopt the *Pawtuxet* approach even though such an approach is not supported by a literal reading of section 505(a)[8] Pet.

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8. Some of the industry amici take issue with the *Pawtuxet* court's holding that a plaintiff who makes allegations

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Br. 16-17; CBIA Br. 54-55; Ch. of Comm. Br. 18-19. The *Pawtuxet* court stated that civil penalties could be sought if there is "a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act." *Pawtuxet*, *supra*, 807 F.2d at 1094. However, no such language is found in section 505(a). To determine whether jurisdiction is proper, *Pawtuxet* stated that courts must consider, among other things, "the degree of scienter on the part of the defendant, and the sincerity of its assurances against future violations." *Id.* However, neither of these considerations is mentioned in section 505(a). The *Pawtuxet* court likely invented its test to avoid the harshness of the *Hamker* approach, which disallows civil penalties unless the discharger is violating an effluent limitation precisely at the time a citizen suit is filed. Indeed, the *Pawtuxet* court admitted its interpretation of section 505(a) was not an absolute, literal application of the language. *Id.* at 1092. Thus, the *Pawtuxet* approach is inconsistent with the petitioner's and industry amici's argument that a literal approach should be adopted.

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warranting injunctive relief, judged objectively, may recover a penalty judgment for past violations even if the injunction proves unobtainable. CBIA Br. 54-62; Ch. of Comm. Br. 21-25; Consolidated Rail Br. 11. These amici would require the allegations be proven before civil penalties could be awarded.

To further restrict the imposition of civil penalties, petitioner and some industry amici argue that even when the jurisdictional hurdle has been met, the district court cannot impose civil penalties for past violations of any permit parameter which was not being violated at the time suit was filed. Pet. Br. 16-17; Consolidated Rail Br. 13; BIA Br. 56-57. Under this interpretation of section 505(a), which has not been adopted by any court, a discharger could violate several permit parameters over the course of a year—causing serious harm to the environment—and could avoid civil penalties for all but one category of violation if only one permit parameter is being violated or is likely to be violated at the time a citizen suit is filed.

Moreover, the *Pawtuxet* approach is at odds with the legislative history of the Clean Water Act and the language in section 505(a) allowing section 309(d) penalties to be imposed. As explained above, this reference to section 309(d) penalties and the legislative history of the Clean Water Act make clear that civil penalties may be imposed under section 505(a) for past violations.

Turning to the *Hamker* approach, this approach, albeit based on a literal reading of section 505(a), is plainly wrong not only because it ignores the section's reference to penalties under section 309(d), but also because it is not supported by the legislative history of the Clean Water Act. The *Hamker* approach is also unworkable. Under EPA regulations, a holder of an NPDES permit is required to monitor its own discharges according to a schedule established in its permit. 40 C.F.R. 122.41(4). Since many NPDES permits do not require daily sampling, it would be impossible to know whether the defendant was violating an effluent limitation on the day the citizen suit was filed if defendant's effluent had not been sampled that day. Even if daily samples are taken, it would also be impossible for a citizen to know whether an effluent limitation was being violated on the day suit was to be filed because dischargers' monitoring reports are not available for citizens to review on a daily basis.

In addition, the *Hamker* approach is inequitable. If civil penalties were authorized only for ongoing violations, dischargers could intentionally violate the Clean Water Act and avoid civil penalties by bringing themselves into compliance just before a citizen suit was filed. With the 60-day notice requirement of section 505(b), a discharger could, in almost all cases, terminate an effluent limitation

violation before a citizen suit is filed and thereby avoid the imposition of civil penalties. One district court, noting "the evil that would be invited" by the *Hamker* approach, observed that "the potential polluter verging upon bankruptcy or shutdown for any reason would be tempted to disregard restrictive effluent controls, lured perhaps by an added incentive to maximize profits or reduce losses of an ailing business." *Sierra Club v. Hanna Furnace Corp.*, 636 F.Supp. 527, 529 (W.D.N.Y. 1985).

In summary, neither the *Hamker* nor *Pawtuxet* approach is supported by the language of the Clean Water Act or its legislative history. On the other hand, the *Gwaltney* approach is supported by both the legislative history of the Clean Water Act and the language of section 505(a) which allows courts to impose section 309(d) civil penalties in a citizen suit. As explained above, the rights of citizens are coextensive with the rights of the EPA Administrator, who can seek civil penalties for past violations under section 309(d). Thus, the Fourth Circuit in *Gwaltney* correctly decided that section 505(a) allows citizens to seek civil penalties for past violations.[9]

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9. In two briefs submitted by industry amici the argument is made that the Clean Water Act's authorization of citizen suits for civil penalties violates the separation of powers mandate of the United States Constitution. See amicus briefs filed by Rollins Environmental Services (NJ) Inc. and Bethlehem Steel Corporation, et al. The separation of powers question is not properly before this Court because it was not the issue on which the petition of certiorari was granted. Therefore, state amici will not address that issue. If the Court decides to rule on the separation of powers question, it is respectfully requested that the parties and all amici be given the opportunity to brief the issue.

II

PETITIONER'S POLICY ARGUMENTS FOR LIMITING CITIZEN SUITS DO NOT WARRANT A NARROW CONSTRUCTION OF SECTION 505

Petitioner asserts that it has consistently complied with the Clean Water Act and argues, along with industry amici, that courts should not have jurisdiction to consider the application of civil penalties against such model dischargers. Pet. Br. 9, 19-21; Mid Atlantic Legal Found. Br. 10-12; CBIA Br. 2. Petitioner and industry amici ignore the fact that district courts are authorized only to impose *appropriate* civil penalties and indeed have the discretion to impose no civil penalties or nominal penalties if circumstances warrant. Courts are well equipped to consider the equities of individual cases, taking into account factors such as the economic benefit gained by the violator; the degree of recalcitrance of the violator; the harm done to public health or the environment; and any unusual or extraordinary enforcement costs thrust upon the public. Indeed, in the 1987 amendments to the Clean Water Act, Congress directed the courts to consider the following factors in determining the amount of civil penalties imposed pursuant to section 309(d): "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." Section 313(c), Water Quality Act of 1987, Pub.L. 100-4, 101 Stat.7.

Citizen suits are merely a means of bringing within district court jurisdiction violations of the Clean Water Act so that appropriate civil penalties can be imposed. Since the judicial process contains the safeguards neces-

sary to avoid arbitrary imposition of civil penalties, the restrictions on citizen suits proposed by petitioner and industry amici are unnecessary.

Petitioner and industry amici also argue that the Court should narrowly interpret section 505(a) because environmental groups allegedly have abused citizen suit provisions in the Clean Water Act and other environmental statutes. Pet. Br. 31-36; Mid Atlantic Legal Found. Br. 10-12; Rollins Environmental Services Br. 15-17; CBIA Br. 37-48. Petitioner and industry amici cite instances where citizen groups have financially benefited from settlement of a Clean Water Act citizen suit. These statements are not supported by any evidence in the record.

Assuming arguendo that the allegations of petitioner and industry amici are true, their remedy is to seek and obtain federal legislation that will eliminate any such alleged abuses. Congress had the opportunity when it amended the Clean Water Act in 1987 to delete the citizen suit provision or limit its application. If petitioner and amici presented their views regarding citizen suit abuse to Congress—and we have no information to that effect—Congress turned a deaf ear, because citizen suit jurisdiction under section 505 was not limited when section 505 was amended in 1987. Indeed, in considering the recent amendments to the Clean Water Act, Congress noted the importance and value of citizen suits. The Senate Committee on Environment and Public Works concluded that:

> "Citizen suits are a proven enforcement tool. They operate as Congress intended—to both spur and supplement government enforcement actions. They have deterred violators and achieved significant compliance gains. In the past two years, the number of citizen suits to enforce NPDES permits has surged so that

such suits now constitute a substantial portion of all enforcement actions filed in Federal court under this Act." S. Rep. No. 50, *supra*, at 28.

Even if petitioner and industry amici did not make known to Congress their concerns regarding citizen suits, this Court is not the proper forum in which to advocate changes in the law. Petitioner and amici present the Court with a political question which the Court has no jurisdiction to resolve. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946); *Baker v. Carr*, 369 U.S. 186, 217 (1962).

Moreover, even if the Court were to narrowly interpret section 505(a) as petitioner and industry amici suggest, the alleged abuses of the citizen suit provisions would not be halted because citizens would retain the right to sue for injunctive relief and civil penalties if any violation is ongoing. Indeed, the hammer of injunctive relief may induce more violators to agree to settlements that benefit citizen groups than the threat of civil penalties.

In arguing for a court ruling that restricts citizen suits for civil penalties, petitioner and industry amici ignore the importance of section 505(a) to the states. States rely on section 505(a) in seeking civil penalties against federal facilities, which are immune from penalties arising under state law.[10] Further, section 505(a) may be the only

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10. Under Clean Water Act section 313, federal facilities are subject to "civil penalties arising under federal law." 33 U.S.C. § 1313. Section 309 of the Clean Water Act authorizes civil penalties to be imposed for violations of effluent limitations and other permit conditions. As explained above, section 309(d) penalties are incorporated by reference into section 505(a), which authorizes suit against the United States as well as private dischargers. Although not without dispute, all the appellate courts that have reviewed the question have determined that states are citizens within the meaning of section 505(a) and thus can seek civil penalties and injunctive relief under that

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vehicle for a state which has not been delegated authority by EPA to administer the NPDES permit program to seek civil penalties against a private discharger of pollutants. Thus, an interpretation of section 505(a) which limits civil penalties to ongoing violations would seriously hamper the enforcement ability of the states.

III

CIVIL PENALTIES ARE AN IMPORTANT MEANS OF COMPELLING COMPLIANCE WITH THE CLEAN WATER ACT

Petitioner and industry amici argue that the imposition of civil penalties for past violations does not further the purposes of the Clean Water Act. In making this argument, petitioners and industry amici ignore the deterrent value of civil penalties.

The goal of the Clean Water Act is to restore and maintain the quality of the nation's waters. Clean Water Act, section 101 (33 U.S.C. § 1251). The purpose of civil penalties is to assist in accomplishing this goal by deterring violations and encouraging voluntary compliance. *Tull v. U.S., supra*, 55 U.S.L.W. at 4574, — U.S. —; *U.S. v. Detrex Chemical Industries, supra*, 393 F.Supp. at 737-738. The deterrent value of civil penalties was recognized by EPA in drafting its civil penalty policy to be applied in enforcement actions under the Clean Water Act, the Clean Air Act and other environmental statutes. U.S. Environmental Protection Agency Civil Penalty Policy (Feb. 16,

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section. *Massachusetts v. United States Veterans Administration*, 541 F.2d 119 (1st Cir. 1976); *Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 631 (7th Cir. 1980), vacated and remanded on other grounds, 453 U.S. 917 (1981). But cf. *United States v. City of Hopewell*, 508 F.Supp. 526 (E.D. Va. 1980).

1984) BNA Federal Laws 41: 2991-3003. EPA's civil penalty policy provides in part as follows:

> "The first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into non-compliance again (specific deterrance) and dissuade others from violating the law (general deterrence). Successful deterrence is important because it provides the best protection for the environment. In addition, it reduces the resources necessary to administer the laws by addressing noncompliance before it occurs.
>
> If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Neither the violator nor the general public is likely to believe this if the violator is able to retain an overall advantage from noncompliance. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance. For these reasons, it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law." *Id.* at 2992.

Thus, civil penalties for both past and ongoing violations are an important tool to further the purposes of the Clean Water Act.

Further, to distinguish between past and ongoing violations in imposing civil penalties results in unfair and inequitable treatment of dischargers. If civil penalties were not allowed for past violations, dischargers could intentionaily violate the Clean Water Act and avoid civil penalties by bringing themselves into compliance just before a citizen suit is filed. Under petitioner's view of section 505(a), such a discharger would be allowed to

benefit from noncompliance while those who have complied with their effluent limitations are placed at a competitive disadvantage. Such a result would frustrate the purposes of the Clean Water Act and could not have been intended by Congress.

IV

THE WEIGHT OF JUDICIAL AUTHORITY SUPPORTS ALLOWING CITIZEN SUITS SEEKING PENALTIES FOR PAST VIOLATIONS

Virtually all courts that have considered the matter have held that citizens may sue for past violations. *Chesapeake Bay Foundation v. Gwaltney of Smithfield, supra,* 791 F.2d at 313; *SPIRG v. AT&T Bell Laboratories, supra,* 617 F.Supp. at 1194-1199; *SPIRG v. Georgia-Pacific Corp., supra,* 615 F.Supp. at 1425-1426; *SPIRG v. Monsanto Co., supra,* 600 F.Supp. at 1486; *Connecticut Fund for the Environment v. The Job Plating Co., supra,* 623 F. Supp. at 213-214; *SPIRG v. Jersey Central Power & Light Co.,* 642 F.Supp. 103, 107 (D.N.J. 1986); *Sierra Club v. Hanna Furnace Corp., supra,* 636 F.Supp. at 529-530; *Alabama ex rel. Graddick v. Veterans Administration,* 648 F.Supp. 1208, 1211 (M.D. Ala. 1986); *Locust Lane v. Swatara Township Authority,* 636 F.Supp. 534, 539 (M.D. Pa. 1986); *Friends of the Earth v. Archer Daniels Midland Co.,* 24 Env't Rep. Cas. (BNA) 1993, 1995-1996 (N.D.N.Y. 1986); *SPIRG v. American Cyanamid Co.,* 23 Env't Rep. Cas. (BNA) 2044, 2049 (D.N.J. 1985); *SPIRG v. National Starch and Chemical Corp.,* 23 Env't Rep. Cas. (BNA) 1982, 1984 (D.N.J. 1985); *SPIRG v. Tenneco Polymers,* 602 F. Supp. 1394, 1399 (D.N.J. 1985); *Fishel v. Westinghouse Electric Corp.,* 617 F.Supp. 1531, 1541 (M.D. Pa. 1985); *Sierra Club v. Simkins Industries,* 617 F.Supp. 1120, 1126-1127, 1131-1132 (D. Md. 1985); *Sierra Club v. C.G.*

Manufacturing, Inc., 638 F.Supp. 492, 494 (D. Mass. 1985); *SPIRG v. Anchor Thread Co.*, 22 Env't Rep. Cas. (BNA) 1150, 1154 (D.N.J. 1984); *Sierra Club v. Aluminum Co. of America*, 585 F.Supp. 842, 854 (N.D.N.Y. 1984); *Sierra Club v. Raytheon Co.*, 22 Env't Rep. Cas. (BNA) 1050, 1053-1055 (D. Mass. 1984); *Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp.*, 635 F.Supp. 284, 286-287 (N.D.N.Y. 1984); *SPIRG v. Ragen Precision Industries*, D.N.J., No. 83-1604, December 19, 1983, Transcript of Proceedings, p.7.

In contrast, only a few decisions support petitioner's interpretation of the Clean Water Act. *Hamker v. Diamond Shamrock Chemical Co., supra*, 756 F.2d at 395; *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., supra*, 807 F.2d at 1093; *Sierra Club v. Copolymer Rubber & Chemical Corp.*, 621 F.Supp. 1013, 1015 (M.D. La. 1985), appeal pending, No. 85-3763 (5th Cir.); *Sierra Club v. Kerr-McGee Corp.*, 23 Env't Rep. Cas. (BNA) 1685, 1690 (W.D. La. 1985). Furthermore, since the district courts in Louisiana were compelled to follow the *Hamker* decision as the binding precedent in their Circuit, the *Hamker* and *Pawtuxet* decisions represent the distinct minority view of the lower courts.

———o———

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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No. 86-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CORRECTED COPY

GWALTNEY OF SMITHFIELD, LTD.,

Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,
and
NATURAL RESOURCES DEFENSE COUNCIL, INC.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL WILDLIFE FEDERATION IN SUPPORT OF RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL WILDLIFE FEDERATION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICUS CURIAE

With written consent of the parties,[1] the National Wildlife Federation ("NWF") respectfully submits this amicus curiae brief pursuant to Supreme Court Rule 36.2. NWF is the nation's largest, not-for-profit, conservation organization with over 4.6 million members, contributors and supporters and has 49 affiliated state organizations. The question before the Court is whether citizen plaintiffs suing violators of the Clean Water Act under section 505(a) must, as a jurisdictional matter, allege and prove that the asserted violations are continuing at the time the action is filed. This issue implicates the efficacy of the role of citizens and citizen groups like NWF in using Clean Water Act § 505(a) to abate water pollution by deterring future violations.

1. The consent letters have been filed with the Clerk of this Court.

As a citizen group which has in the past prosecuted citizen enforcement actions under § 505(a), NWF is concerned that this section be interpreted to discourage violations of the law.

SUMMARY OF ARGUMENT

Section 505(a) of the Clean Water Act ("CWA" or "the Act") was intended by Congress to give citizens a vital role in abating water pollution through the prosecution of citizen enforcement actions. To that end, Congress specifically authorized citizens to file enforcement suits against violators in which civil penalties could be assessed for past violations.[2] In this way, Congress enlisted the aid of concerned citizens in stopping specific violations and, just as important, in deterring generally violations of the Act.

Congress also recognized that the circumstances involving particular violations might warrant a civil penalty less than the statutory maximum or, perhaps, no penalty at all. Congress authorized the federal district courts to exercise discretion in determining the appropriate penalty amount. Therefore, where violations have ceased at the time of the filing of a citizen suit complaint, a court can fashion the appropriate remedy—as the district court did here—considering, *inter alia*, how the specific and general deterrence policies of the Act will best be served.

The reading of section 505(a) urged upon the Court by Petitioner would supplant this judicial discretion with a complicated, jurisdictional bar to all citizen suits for penalties involving violations that have ceased when the complaint is filed. This jurisdictional bar would preclude citizen actions for penalties in such cases regardless of whether the purposes of the Act would be served by a civil penalty remedy.

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2. Petitioner does not contend that citizens are barred from seeking to assess civil penalties for past violations. Rather, Petitioner argues that this authority is ancillary to the authority to obtain injunctive relief against continuing violations. Therefore, according to Petitioner, citizen plaintiffs must allege and prove that a violation of the Act was occurring at the time the complaint is filed in order for the court to have jurisdiction to assess civil penalties for the past violations.

ARGUMENT

I. Congress gave citizen plaintiffs the authority to seek civil penalties for past violations of the Act in order to deter specifically and generally future violations.

Petitioner urges upon this Court a narrow understanding of the role contemplated by Congress for citizen enforcement actions by suggesting that "pollution abatement" is necessarily synonymous with prospective, i.e. injunctive, relief. In its brief, Petitioner cites repeatedly to the legislative history of the Act to argue that Congress intended that citizen suits be brought only to "abate" pollution. *See, e.g.*, Pet. Brief at p. 9, pp. 26-27 n. 27, and p. 29. Petitioner concludes from these citations, without further discussion, that the only way Congress intended that citizens "abate" pollution is by filing suit against continuing violators.

Petitioner also slights the significance of the unequivocal remarks of Senator Muskie, the single most important legislator with respect to the development of the Act,[3] in which he stated that, "[a] citizen has the right under Section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be, *or to have been* in violation, whether the violation be a continuous one, or an occasional or sporadic one." 118 Cong. Rec. 33700 (1972) (emphasis added), *reprinted in* Cong. Research Service, *A Legislative History of the Water Pollution*

3. Petitioner suggests that this Court should accord Sen. Muskie's remarks no greater weight than due those of any individual legislator. Pet. Brief at 28. However, the Court has frequently recognized Sen. Muskie's central role in the development of the Clean Water Act and has repeatedly relied on his remarks in interpreting the Act. *E.g., Tull v. U.S.*, 55 U.S.L.W. 4571, 4574, n. 8 (Apr. 28, 1987); *Chemical Mfr's Assoc. et al.* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 140 (1985) (Marshall, J., dissenting) (quoting Sen. Muskie and identifying him as "the major drafter and Senate manager of the [1977] bill [amending the Act]"); *Environmental Protection Agency* v. *Nat'l Crushed Stone Assoc. et al.*, 449 U.S. 64, 71, n. 10 (1980) (referring to Sen. Muskie as "the principal Senate sponsor of the Act"); *E.I. duPont de Nemours & Co. et al.* v. *Train*, 430 U.S. 112, 129 (1977) (relying on Sen. Muskie's remarks in presenting the Conference report to the Senate and referring to him as "perhaps the Act's primary author"); *Train* v. *Colorado Public Interest Research Group, Inc. et al.*, 426 U.S. 1, 14 (1976) (relying on colloquy participated in by Sen. Muskie to interpret Act and referring to him as "the Act's primary author").

Control Act Amendments of 1972, 1794 (Comm. Print 1973) (hereinafter "*1972 Legislative History*"). Petitioner would have this Court understand that these remarks represent merely the isolated views of an individual legislator, Pet. Brief at 28, n. 29, and that they do not fairly characterize the kind of "pollution abatement" role Congress desired for citizen plaintiffs.

In making this argument, Petitioner ignores the broader deterrence role contemplated by Congress for Clean Water Act citizen suits. This Court has recently recognized that deterrence is a primary function of civil penalties assessed under the Act: "[t]he legislative history of the Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." *Tull* v. *U.S.*, 55 U.S.L.W. 4571, 4574 (Apr. 28, 1987). Petitioner is able to ignore this essential feature of the Act by confining its discussion of the legislative history to the latter stages of the Act's development, beginning with the introduction of S. 2770 and H.R. 11896 in October 1972.[4]

It is true that the debates on S. 2770 and H.R. 11896 contain little discussion of citizen enforcement actions to assess civil penalties. This is because both bills, as introduced, contained identical language authorizing citizen actions to assess penalties for past violations. S. 2770, 92nd Cong., 1st Sess., § 505(a), *1972 Legislative History* at 1704; H.R. 11896, 92nd Cong., 1st Sess., § 505(a), *1972 Legislative History* at 1074.

Congress's intentions in authorizing citizen actions to recover civil penalties for past violations can be discerned only by reviewing congressional action during the two years immediately preceding the introduction of these two bills.[5] This history provides the context for understanding Senator Muskie's remarks as a

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4. Based on the lack of significant discussion of civil penalties in the history of these two bills, Petitioner urges this Court to attach no significance to the fact that Congress gave citizen plaintiffs under the Clean Water Act an additional, potent remedy—assessing civil penalties—not available under the comparable section of the Clean Air Act, upon which § 505(a) was modelled. Pet. Brief at 27-28.

5. The correctness of this approach is demonstrated by the Senate Report on S. 2770 which explicitly referenced much of this earlier history. S. Rep. No.

succinct and accurate summary of congressional intent that Section 505(a) authorizes citizen suits for penalties, regardless of whether the violations were occurring at the time the action was initiated.

Congressional consideration of this issue in the 92nd and 91st Congresses occurred contemporaneously on two parallel fronts: (1) congressional hearings and reports on citizen enforcement of the Refuse Act of 1899; and (2) congressional hearings on the predecessor bills to S. 2770 & H.R. 11896. This history demonstrates Congress's intent to fashion an effective pollution abatement role for citizens in order to deter, both specifically and generally, violations of the Act.

In 1972, Congress amended the Federal Water Pollution Control Act out of frustration with the general ineffectiveness and limited enforcement of existing federal water pollution control laws. The Senate Committee on Public Works stated in its report on S. 2770, "[f]rom its two-year study on the Federal water pollution control program, the Committee concludes that the national effort to abate and control water pollution has been inadequate in every vital aspect." S. Rep. No. 414, *supra*, at 7, *1972 Legislative History* at 1425. The Committee was well equipped to make this statement having spent over two years holding hearings on federal water pollution control activities and considering various proposals to refashion the federal government's role. S. Rep. No. 414, *supra*, at 3-4, *1972 Legislative History* at 1421-22.[6]

Congress was particularly frustrated with governmental failure to enforce the existing laws. Senator Muskie, Chairman of the Subcommittee on Air & Water Pollution and the primary author

414, 92nd Cong., 1st Sess. (1971) 3-4, *1972 Legislative History* at 1421-22 (Committee description of 1970 and 1971 Hearings).

6. A general background of the 1972 Act and an overview of the congressional hearings that resulted in S. 2770 and H.R. 11896 can be found in H. Lieber, *Federalism and Clean Waters: The 1972 Water Pollution Control Act* 1-75 (1975).

of the Clean Water Act, summarized this congressional dissatisfaction and his remarks illustrate Congress's search for an alternative enforcement mechanism:

> The continued use of the 1948 abatement procedure also contributes to delay[; that and] the almost total lack of enforcement encourage governing bodies and officials to look for other, more direct avenues of action against water polluters and water pollution. One such approach . . . is the use of section 13 of the 1899 Refuse Act . . . .

117 Cong. Rec. 38799, (November 2, 1971).

Congressional hearings and reports from 1970 and 1971[7] demonstrate Congress's desire that past violations of the law be vigorously prosecuted to deter generally and specifically future violations of the law. Initially, the hearings and reports of Congressman Reuss's Conservation & Natural Resources Subcommittee suggested that this objective could be served by encouraging *qui tam* citizen actions to assess penalties for past

7. During this time, hearings were held and/or reports were issued by subcommittees of the Senate Public Works Committee, the Senate Commerce Committee and the House Government Operations Committee. House Comm. on Gov't Operations, *Our Waters and Wetlands: How the Army Corps of Engineers Can Help Prevent Their Destruction and Pollution*, H. Rep. No. 917, 91st Cong., 2d Sess. (1970); Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations, *Qui Tam Actions and the 1899 Refuse Act: Citizen Lawsuits Against Polluters of the Nation's Waterways*, 91st Cong., 2d Sess. (Comm. Print, Sept. 1970); *Water Pollution—1970 (Part 1): Hrgs. before the Subcomm. on Air & Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess. (April 20, 21, & 27, 1970); *The Establishment of a National Industrial Wastes Inventory: Hrg. before the Conservation and Natural Resources Subcomm. of the House Comm. on Gov't Operations*, 91st Cong., 2nd Sess., (Sept. 17, 1970); *Water Pollution Control Legislation: Hrgs. before the Subcomm. on Air & Water Pollution of the Senate Comm. on Public Works*, 92 Cong., 1st Sess. (1971); *The Refuse Act Permit Program: Hrgs. before the Subcomm. in the Env't of the Senate Comm. on Commerce*, 92nd Cong., 1st Sess. (Feb. 18 & 19, 1971); *Mercury Pollution and Enforcement of the Refuse Act of 1899 (Part 1): Hrg. Before the Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations*, 92d Cong., 1st Sess., (July 1, 1971); *Mercury Pollution and Enforcement of the Refuse Act of 1899 (Part 2): Hrgs. before the Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations*, 92d Cong., 1st Sess., (Oct. 21 & Nov. 5, 1971).

violations of the Refuse Act of 1899. This, it was hoped, would fill the vacuum created by the federal government's failure to enforce vigorously the law.

After further hearings convinced Congress that these actions would not be as effective as hoped, Congress imported a similar concept into the Clean Water Act. Based on experience under the Refuse Act and working with the citizen suit provision of the Clean Air Act as its model, Congress added citizen authority to assess civil penalties for past violations to the Clean Water Act.

A. Citizen enforcement of the Refuse Act: *qui tam* actions.

Congress's frustration with lax enforcement of federal water pollution control law and with the lack of responsiveness by the government to citizen involvement in enforcement was first manifested in oversight hearings on enforcement of the Refuse Act of 1899[8] held by the House Government Operations Committee's Conservation & Natural Resources Subcommittee in 1969-1971.[9] This subcommittee, in particular its chairman, Congressman Reuss, played a leading role in the deliberations on citizen

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8. The Refuse Act, § 13 of the Rivers & Harbors Act of 1899, 30 Stat. 1152, *codified at* 33 U.S.C. § 407, provides, in pertinent part:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited . . . any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water . . . .

This Court has construed the Refuse Act to prohibit discharges of liquid, industrial wastes (municipal sewage was excluded) and to authorize penalties, damage actions, and injunctive relief. *U.S.* v. *Standard Oil Co.*, 384 U.S. 224, 230 (1966); *U.S.* v. *Republic Steel Corp.*, 362 U.S. 482, 490 (1960); *Wyandotte Transp. Co.* v. U.S., 389 U.S. 191, 203-04 n. 15 (1967).

9. In addition to the hearings discussed in the text, *see The Establishment of a National Industrial Wastes Inventory: Hearings Before the Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations*, 91st Cong., 2nd Sess. (Sept. 17, 1970) (Comm. Print); *Mercury Pollution and Enforcement of the Refuse Act of 1899: Hearings Before the Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations*, 92nd Cong., 1st Sess. (July 1, 1971).

enforcement of federal water pollution control laws that led eventually to section 505(a). The Subcommittee's hearings and reports occurred at the same time as Congress was considering amendments to the Federal Water Pollution Control Act and provide the context for the development of the Clean Water Act's citizen enforcement provisions.

The Subcommittee focused national attention on the Refuse Act of 1899 as "a potentially powerful . . . weapon for combatting the pollution of [the] Nation's waters [which was] only sporadically used." House Comm. on Gov't Operations, *Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution*, H. Rep. No. 917, 91st Cong., 2d Sess. 15-18 (1970). The Refuse Act provides that any person who provides information about a violation of the Act that leads to a conviction is entitled to one-half of any fine paid. 33 U.S.C. § 411. Violators are subject to criminal prosecution and the imposition of fines of between $500 and $2500 per violation. *Id.*

In light of lax government enforcement of the Refuse Act, the Committee emphasized the potential for citizen actions to recover the informant's share of the penalty. The Committee suggested that a citizen may, where "the Government has not previously instituted a prosecution against the violator, . . . institute his own suit in the name of the United States (a *qui tam* action) to collect his moiety of the penalty." *Id.* at 17.

The Committee's report generated tremendous interest in the Refuse Act. "Many Members of Congress and many thousands of citizens [ ] asked for additional information on how to assist the Federal Government in enforcing the 1899 law and abating water pollution." House Comm. on Gov't Operations, *Enforcement of the Refuse Act of 1899*, H. Rep. No. 1333, 92nd Cong., 2nd Sess., 11 (1972). In response to the outpouring of public interest, the Subcommittee staff prepared a memorandum which described the "possible use [of *qui tam* actions] in implementing the Refuse Act of 1899." Conservation and Natural Resources Subcomm. of the Comm. on Gov't Operations, *Qui Tam Actions and the 1899 Refuse Act: Citizen Lawsuits Against Polluters of*

the Nation's Waterways; 91st Cong., 2d Sess. (Comm. Print, Sept. 1970). The memorandum surveyed the pertinent law to assess the efficacy of citizen enforcement of the Refuse Act and to encourage that such actions be filed.

Subsequently, on February 18 and 19, 1971, the Senate Commerce Committee's Subcommittee on the Environment held hearings on the Refuse Act permit program, in which Congressman Reuss and other members of the House Government Operations Committee's Conservation & Natural Resources Subcommittee participated. *Refuse Act Permit Program: Hearings before the Subcomm. on the Environment of the Comm. on Commerce, 92nd Cong., 1st Sess. (Feb. 18 & 19, 1971).* At those hearings, the Subcommittee heard testimony about enforcement of the Refuse Act, the role of citizen informants, and the need for fines substantial enough to deter violators. *Id.* at 28 & 29 (Statement of John Burns, Exec. Ass't to the U.S. Att'y for the S.D. N.Y.) ("informant's fees . . . [were] a strong inducement for people to come forward with information about the water pollution" and success in Refuse Act enforcement depended on "fines . . . substantial enough that they were somewhat a deterrent to industrial polluters"); *id.* at 74 (statement of J.G. Speth) (as a result of delays in implementing proposed Refuse Act permit program "successful citizen actions (*qui tam*) will be a practical impossibility").

Congressman Reuss's Subcommittee on Conservation & Natural Resources followed up this hearing with three additional, lengthy hearings on enforcement of the Refuse Act. *Mercury Pollution and Enforcement of the Refuse Act of 1899 (Part 1): Hearing Before the Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations,* 92nd Cong., 1st Sess., (July 1, 1971); *Mercury Pollution and Enforcement of the Refuse Act of 1899 (Part 2): Hearings Before the Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations,* 92nd Cong., 1st Sess., (Oct. 21 & Nov. 5, 1971). The government's failure to respond to citizen complaints by initiating enforcement actions was a major topic of discussion at

these hearings. Subcommittee Chairman Reuss had filed 268 complaints of Refuse Act violations with the U.S. Attorney in Wisconsin and questioned closely Shiro Kashiwa, Assistant Attorney General, Land & Natural Resources Division, about the government's failure to prosecute these violations. In particular, Congressman Reuss was concerned that his complaint about past violations by a facility which had since shut down had not led to prosecution:

> Mr. REUSS: Take Citizen Reuss, for instance, who 15 months ago said, with respect to the Du Pont Co.—and this is just one of the cases I filed—that they were dumping red chemicals into Lake Superior.... Now, you wouldn't call that a frivolous complaint; would you?
>
> Mr. KASHIWA: Of course not. But in relation to that particular plant, which we discussed a long time, *I have been informed that they have completely stopped discharging* .
>
> Mr. REUSS: They completely stopped discharging because they were afraid that someday the Department of Justice might come to life and prosecute them. They closed the plant last month.
>
> Mr. KASHIWA. Yes.
>
> Mr. REUSS: *But what about the past pollution there?* .... [W]hy don't you prosecute Du Pont for its flagrant and open violation of the Refuse Act of 1899 up to and including last month, when they stopped polluting because they closed the plant?

Mercury Pollution and Enforcement of the Refuse Act of 1899 (Part 1): Hearing Before the Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations, 92nd Cong., 1st Sess., 37-38 (July 1, 1971) (emphasis added).

Based on its hearings,[10] the House Conservation & Natural Resources Subcommittee issued a report on enforcement of the Refuse Act. *Enforcement of the Refuse Act of 1899*, H. Rep.

10. The Report references several hearings held by the Subcommittee on the enforcement and implementation of the Refuse Act. *See* the Subcommittee hearings listed in note 7 *supra*.

No. 1333, 92nd Cong., 2d Sess., (1972). The report found that "after a slow start, the government's enforcement of the Refuse Act has been erratic, not 'vigorous'." *Id.* at 6 (upper case in original). The Committee found that the government was enforcing the Act only against egregious violators and that the Justice Department's enforcement guidelines were frustrating the efforts of enforcement-minded U.S. Attorneys.[11]

Most upsetting to the Committee was that government policy limited citizen involvement in enforcement. Citizen involvement was deemed critical by the report which concluded "the provision of the Refuse Act of 1899 specifying that one-half of any fine imposed by a court against a Refuse Act violator be paid to the citizen who gives information leading to the conviction has greatly helped enforcement of the Act." *Id.* at 10 (upper case in original). However, the Committee concluded to its dismay that "the government's policy of relying principally on efforts to persuade polluters to obey the law and using litigation as a last resort is undermining the role of citizens in enforcement of the [Refuse] Act." *Id.* at 12 (upper case in original).[12] Finally, the Committee report emphasized the importance of strict enforcement of the Refuse Act as a means of deterring generally future violations.

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11. The Department of Justice issued a guideline on June 13, 1970, which directed U.S. attorneys to bring suit "against the 'accidental or infrequent' polluter, but not against any continuing industrial discharger who is complying with ... a State or ... Federal Water Quality Administration" program. "Guidelines for Litigation Under the Refuse Act (33 U.S. Code 407)," *reprinted in The Establishment of a National Industrial Wastes Inventory: Hrg. before the Conservation and Natural Resources Subcomm. of the House Comm. on Gov't Operations*, 91st Cong., 2nd Sess., 145 (Sept. 17, 1970), despite the statutory command that United States attorneys "vigorously prosecute all offenders" of the Refuse Act. 33 U.S.C. § 413. "As a result of congressional and public objections, these guidelines were revised in April 1971 but still restrict enforcement of the act." *Enforcement of the Refuse Act of 1899*, *supra*, at 4.

12. The report found that until 1971 the Justice Department failed even to maintain records of citizen complaints under the Refuse Act. According to the report, this "failure will undoubtedly result in nonaction on many citizen complaints of violations of the 1899 law." *Enforcement of the Refuse Act of 1899*, *supra*, at 13. Moreover, the Committee found that U.S. EPA guidelines for

> The committee believes that the Corps, EPA, and the Justice Department should stand ready to prosecute, civilly or criminally, or both, any person or company where there is sufficient evidence, whether obtained by a citizen or by the Government, of violations of the Refuse Act, and that these agencies should make it clear that this is the Federal Government's policy. *A violator who knows that the Government's policy is not to sue, except where there is 'noncooperation' by the violator, or nonenforcement of State or local antipollution laws, has less incentive to take steps toward full compliance with the law.*

Id. at 23 (emphasis added).

B. Congressional hearings on predecessor bills to S. 2770 and the evolution of the Clean Water Act citizen action for civil penalties.

1. The 1970 bills & hearings.

Contemporaneously with congressional oversight hearings on the implementation of the Refuse Act and the usefulness of *qui tam* actions, Congress considered various proposals to revise drastically federal water pollution control law. Concern for spurring effective enforcement of the law by authorizing citizen enforcement is a consistent thread woven through two years of hearings and several bills.

The first bill pertinent here was introduced by Senator Muskie in 1970 and included a citizen suit provision allowing citizens to obtain declaratory and injunctive relief against violations of ambient water quality standards or of plans developed to achieve those standards. S. 3687, 91st Cong., 2d Sess. § 10(f) (1970),

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enforcing the Refuse Act, U.S. EPA, "Guidelines on Water Pollution Enforcement" 36 Fed. Reg. 13,203 (June 25, 1971), *reprinted in Mercury Pollution and the Enforcement of the Refuse Act, Part 1, supra*, at 926-28, further undermined citizen participation in enforcement due to a preference for negotiation during an administratively imposed, 180-day notice period. *Enforcement of the Refuse Act of 1899, supra*, at 14. The Committee found that such negotiations often resulted in "verbal agreements with the polluters which are kept largely secret and unavailable to public or congressional scrutiny" and which were largely unenforceable. *Id.* at 4.

reprinted in Water Pollution—1970 (Part 1): Hearings before the Subcomm. on Air & Water Pollution of the Sen. Comm. on Public Works, 91st Cong., 2d Sess. 41-42 (April 20, 21 & 27, 1970).[13] S. 3687 also contained a "bounty" provision similar to that found in the Refuse Act of 1899, which awarded one-tenth of any penalty collected by the federal government from a violator to anyone giving information leading to the conviction. S. 3687, *supra*, § 10(e)(7)(A), *reprinted in 1970 Public Works Comm. Hearings* at 37. However, informant's actions to collect their share of a penalty where the government failed to prosecute (i.e. *qui tam* actions) were not specifically authorized in the bill.

There was considerable discussion during the Committee hearings of the citizen enforcement provisions of S. 3687 and of the lack of a similar provision in the Nixon Administration's bill, S. 3471, S. 3471, 91st Cong., 2d Sess. (1970), *reprinted in 1970 Public Works Comm. Hearings* at 77-102. *See, e.g., 1970 Public Works Comm. Hearings* at 393 (opposition to citizen suit authority by Nat'l Assoc. of Mf'rs.) ("This we feel is an unnecessary additional enforcement weapon which would only lead to harassment of legitimate business and serve no justifiable end."); *Id.* at 1347 (statement in support by Philip Douglas, Exec. Sec'y, Sport Fishing Inst.) ("The penalties prescribed in S. 3687 would be a positive deterrent to the *potential polluter*, no matter how strong his financial backing, and we actively favor these provisions." (emphasis added)); *Id.* at 1662 (statement in support by David R. Zwick) ("[S. 3867 in contrast to S. 3471] addresses the problems of policing—avoiding the need for a massive Federal pollution police force by providing citizens with an incentive to participate in the enforcement process.").

Mr. Zwick's statement focused in large part on the need to enact legislation which provided an "effective deterrent to pollution violations." *Id.* at 1672. To achieve deterrence, Mr. Zwick spoke in favor of the bounty provisions of S. 3687. Responding to Mr. Zwick's testimony, Senator Muskie noted his interest in

13. Hereinafter referred to as *"1970 Public Works Comm. Hearings."*

revising the citizen suit provision of S. 3867 to make it even more effective.

> I especially like your attention to the problem of enforcement. The approach to this problem contained in S. 3687 is not one we were entirely happy with when we introduced the legislation. We are in the process of discussing the same problem in the mark-up sessions on the air pollution legislation.

Id. at 1665.

Later during the same hearing, Senator Muskie elaborated on the improvements he sought in the citizen enforcement authority:

> What we would like to see the citizen suit provision accomplish is two things: (1) act as a prod on industry, *not only on those directly subject to suit but also on others*, and; (2) act as a stimulant and, indeed, a guide to Government enforcement programs.

Id. at 1667 (emphasis added).

This discussion reveals Senator Muskie's concern that the citizen suit provision as written in S. 3687 did not fully satisfy congressional goals for such actions: it did not effectively grant citizens a remedy which would result in general deterrence of illegal pollution. These comments of Senator Muskie are consistent with, and demonstrate the significance of, his later remarks explaining the final conference committee version of S. 2770 in which he stated that citizen enforcement actions could be brought "whether the violation be a continuous one, or an occasional or sporadic one." 118 Cong. Rec. 33700 (1972), *1972 Legislative History* at 179. However, S. 3687 never proceeded beyond the hearing stage as Senator Muskie, his Subcommittee, and the Congress turned its attention to enacting the Clean Air Act of 1970.

2. The 1971 bills & hearings.

Having enacted the Clean Air Act, Congress turned its attention in 1971 back to reworking federal water pollution control

laws. Again, Senator Muskie, Chairman of the Subcommittee on Air & Water Pollution of the Committee on Public Works, took the lead. Senator Muskie introduced new legislation which, like the 1970 bill, included a citizen suit provision which authorized only declaratory and injunctive relief. S. 523, § 11(i), *reprinted in Water Pollution Control Legislation: Hearings before the Subcomm. on Air & Water Pollution of the Sen. Comm. on Public Works*, 92 Cong., 1st Sess. 193, 230-31 (1971).[14] However, S. 523 did not contain a bounty provision for informants who gave information leading to convictions for violations, an omission which was addressed later in the hearings. As in 1970, there was a competing bill supported by the Nixon Administration, but this time its bill included a citizen suit provision. S. 1014 (proposing new § 10(k) to the existing Federal Water Pollution Control Act), *reprinted in 1971 Public Works Comm. Hearings*, 306, 329-30. Neither bill authorized citizen suits to assess monetary penalties against violators.

In his opening statement, Senator Muskie acknowledged that there were some problems identified in previous hearings which were not addressed by the pending bills. He listed four examples of these problems including the need for "[p]rovisions for citizen suits to stop violations of the program under the Refuse Act of 1899." *Id.* at 2.

In the intervening period between the Muskie subcommittee's 1970 and 1971 hearings, many of the hearings and reports on enforcement of the Refuse Act of 1899 discussed earlier occurred. Not surprisingly, then, the omission of an informants' bounty provision from S. 523 did not escape attention during the hearings. In fact, it provoked a broader discussion of the need to provide citizens with an action to assess penalties where the government failed to do so. As in the previous hearings, David R. Zwick addressed this issue most thoroughly. He specifically asked the subcommittee to amend the bills to provide a *qui tam*-like action in order to deter violations:

14. Hereinafter referred to as "*1971 Public Works Comm. Hearings*".

> The most important addition the subcommittee could make to the citizen suit provision, and to the water pollution enforcement scheme in general, would be providing in the statute for a *qui tam* style action—that is, an action by a citizen to collect a fine due him when the Government does not choose to pursue the case. Such a provision is essential for several reasons. *First, the only workable deterrent against pollution is the knowledge that a penalty—stiff enough to make avoiding pollution cheaper than polluting—will be levied for past violations. If a polluter knows that the only remedy citizens have against him is an injunction to take effect in the future, there is nothing to discourage him from polluting until he is enjoined.* . . . In summary, I believe that the statutory *qui tam* action is an absolutely indispensable element in any effective citizen suit package.

Id. at 727-28 (emphasis added).

Senator Eagleton, Vice-Chairman of the Air & Water Pollution Subcommittee, was chairing that day's hearing, and he discussed with Mr. Zwick the need for citizen actions to assess penalties. *Id.* at 729-31. In that exchange, Senator Eagleton suggested that the omission of the informants' bounty provision from S. 523 was an oversight, *id.* at 729, and pressed Mr. Zwick on the kinds of penalties which citizens should be authorized to seek.

> Senator EAGLETON: In terms of fines, how do you view them, civil or criminal?
>
> Mr. ZWICK: I would like to see them civil. I think that would—
>
> Senator EAGLETON: With a double damages provision, a la Sherman perhaps?
>
> Mr. ZWICK: Well, rather than damages, which are I think one of the very murky things in the environmental area, *I think the basic notion should be one of deterrence* . . . .

Id. at 731 (emphasis added).

Finally, Senator Philip Hart, Chairman of the Senate Commerce Committee, which held the Senate hearings on the Refuse Act, appeared before the Subcommittee to urge the inclusion of a *qui tam*-type citizen suit action in the legislation as a way to integrate it with citizen enforcement of the Refuse Act. *Id.* at 1019-21. In his remarks, Senator Hart referred to Congressman Reuss's efforts in the House to encourage citizen action to enforce the Refuse Act. *Id.* at 1020.

The 1971 hearings reflect Congress' appreciation that *qui tam* actions under the Refuse Act were not proving to be an effective remedy.[15] Also, these hearings demonstrate congressional understanding that the addition of citizen suit penalty authority would enhance deterrence of violations, both by the polluter being sued and by others. Therefore, it is not surprising the Senate Public Works Committee's draft print of a revised bill in response to these hearings included, for the first time, the language authorizing citizen suits to assess civil penalties—the identical language later included in both S. 2770 and H. 11896 and enacted into law as § 505(a) of the Act. Comm. on Public Works, *Federal Water Pollution Control Amendments* 44 (July 2, 1971) (staff working print) *reprinted in 1971 Public Works Comm. Hearings* 1595 (General Appendix, Sec. II).

This print of the legislation was circulated widely and numerous responses are included in the record of the 1971 hearings. Only two of these responses focused on the addition of authority to assess civil penalties to the citizen suit provision. The National Association of Electric Companies supplied for the

15. All the citizen *qui tam* actions filed in response to the attention focused upon this potential action under the Refuse Act were dismissed for failure to state a claim upon which relief could be granted, the courts holding that Congress did not confer such a cause of action on citizen informants. *Anderson* v *Norfolk & Western Railway*, 349 F.Supp. 121 (W.D.Va. 1972); *Bass Anglers Sportsman's Soc. of America* v. *Scholze Tannery, Inc.*, 329 F.Supp. 339 (D.Tenn. 1971); *Bass Anglers Sportsman's Soc. of America* v. *U.S. Plywood-Champion Papers, Inc.*, 324 F.Supp. 302 (S.D.Tex. 1971); *Enquist* v. *Quaker Oats Co.*, 327 F.Supp. 347 (D.Neb. 1971); *U.S. ex rel. Mattson* v. *Northwest Paper Co.*, 327. F.Supp. 87 (D.Minn. 1971); *U.S.* v. *Florida-Vanderbilt Development Co.*, 326 F.Supp. 289 (D.Fla. 1971).

record a marked-up copy of the working print in which the civil penalty authority is crossed out, but no explanation of their response is included. *1971 Public Works Comm. Hearings* at 1754. The American Iron & Steel Institute also submitted a marked-up copy of the working print for the record which included a marginal note next to the civil penalty authority reading,

> Section (a)(2) of the Committee Print goes well beyond the injunctive relief contemplated at the Committee hearings relating to S. 523 and S. 1014. The Print now being considered would authorize the district courts to impose the same harsh and unrealistic civil penalties [in a citizen suit] permitted in Section 309. If it is the will of the Congress that Citizen Suits are essential to the Federal water pollution control program, it would appear sufficient that the court be given the power to enjoin pollution at its source. The civil penalties should be eliminated.

Id. at 1656.

Congress did not heed the pleas of these groups and the bills introduced that fall in both the Senate and the House of Representatives (S. 2770 and H.R. 11896) included unchanged the provisions from the Committee draft authorizing courts hearing citizen suits to assess civil penalties for the past violations.

As this history indicates, Congress granted the federal district courts discretion to assess civil penalties in citizen suits out of frustration with the federal government's failure to enforce effectively the Refuse Act penalty provision. Congress recognized that assessing penalties for past violations was an essential component of abating pollution by deterring, both specifically and generally, future violations of the law. Thus, Congress created a *qui tam*-like action in which citizen plaintiffs could effectuate general and specific deterrence by suing for civil penalties. Petitioner's interpretation of § 505(a) ignores this history and would defeat those congressional purposes by denying courts the discretion to assess civil penalties in an entire class of cases, regardless of whether it would serve the general and specific deterrence goals of the Act.

II. The broad deterrent purposes of the Clean Water Act would be thwarted by a complicated jurisdictional bar to judicial discretion to assess civil penalties in the absence of continuing violations.

As the foregoing discussion of the early history of the Act reveals, Congress granted citizens authority to seek civil penalties out of frustration with the lack of government enforcement and in recognition of the need for strong citizen enforcement to deter future violations of the Act. Therefore, Congress deliberately provided citizens with an efficient remedy, based largely on self-reported violations, to assist in abating pollution.[16] However, Congress tempered the sweeping authority granted citizens to

16. A comprehensive study of citizen suits under the Clean Water Act concluded that they have a significant effect in deterring violations. Environmental Law Institute, *Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes* v-11 (Sept. 1984) ("[T]he study suggests that the current wave of citizen actions could be a significant general deterrent . . . The scope and effectiveness of the publicity generated by recent citizen enforcement seems likely to provide general deterrence."). The report concluded "that the system of citizen enforcement is currently operating as Congress intended: to provide (1) a goad and (2) an alternative to government enforcement." *Id.* at vii. It suggested that the availability of civil penalties in citizen actions—the "penalty engine"—was a major motivation for these suits and suggested that amending other federal environmental laws to authorize citizen actions to recover civil penalties would encourage citizen enforcement of them. *Id.*, at v-3.

Congress recently reaffirmed its approval of citizen actions for civil penalties by expanding the jurisdiction of district courts to assess civil penalties in citizen suits brought under the Resource Conservation and Recovery Act (RCRA), The Hazardous and Solid Waste Amendments of 1984, Pub. Law No. 98-616, § 401(b), 98 Stat. 3221, 3269, *to be codified at* 42 U.S.C. § 6972, *reprinted in* 1984 U.S. Code Cong. & Ad. News, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Superfund Amendments and Reauthorization Act of 1986, Pub. Law. No. 99-499, § 206, 100 Stat. 1613, 1703-05, *to be codified at* 42 U.S.C. § 9659, *reprinted in* 1986 U.S. Code Cong. & Ad. News (Dec. 1986 Advance ed.), and did so by using the same language as CWA § 505(a). In describing the 1986 amendments of CERCLA, Sen. Baucus (the author of the civil penalty amendment) explained his proposal by reference to the Environmental Law Institute study of Clean Water Act citizen suits. Sen. Baucus concluded, as did the Environmental Law Institute report, that "the system of citizen enforcement is currently operating as Congress intended" and that "the scope and effectiveness of the publicity generated

enforce against *all* violations of certain provisions of the Act, regardless of their significance, by granting federal district courts discretion in fashioning the appropriate relief. *See Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 318 (1982) (courts have discretion in fashioning equitable relief for violations of the Act "to order relief that will achieve *compliance* with the Act." (emphasis in original)).

While Congress intended that the determination of violations in citizen actions be simple and expeditious,[17] the factual inquiry necessary to determine the appropriate remedy is significantly more complicated.[18] Petitioner would have this Court require that district courts make complicated factual findings on many of the remedial-type considerations specified by Congress as a jurisdictional matter in determining whether a citizen action for penalties may proceed. Moreover, where, based on this complicated inquiry, continuing violations were found not to exist, Petitioner would bar courts from serving the deterrent purposes of the Act

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by recent citizen enforcement seems likely to act as a general deterrent." 131 Cong. Rec. S12026 (daily ed. Sept. 24, 1985).

17. *See* Sen. Rep. No. 414, *supra*, at 64, 65, 79, 80 & 81, *1972 Legislative History* at 1482, 1483, 1497, 1498 & 1499.

18. In the recent amendments to the Act, Congress specifically listed several considerations to be taken into account by district courts in determining appropriate civil penalties for violations of the Act. Section 313 of the Water Quality Act of 1987, Pub. Law No. 100-4, 101 Stat. 7, 45, *reprinted in* 1987 *U.S. Code Cong. & Ad. News* (March 1987 advance ed.) provides:

> Section 309(d) is amended by adding at the end thereof the following: "In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. . . ."

The considerations listed by Congress are all specific factors relevant to determining the penalty amount necessary to deter, both generally and specifically, future violations. *See* EPA, "Clean Water Act Civil Penalty Policy" (Feb. 11, 1986); EPA, "Civil Penalty Policy" [Federal Laws] *Env't Rep.* (BNA) 41:2991 (June 1, 1984) discussed in detail by the court below, *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield, Ltd.*, 611 F.Supp. 1542, 1556-57 (E.D. Va. 1985). In general, these policies separate the inquiry into three phases: (1) calculating the statutory maximum penalty; (2) determining the "primary deterrence" figure; and (3) considering other factors.

by awarding civil penalties, no matter how egregious the admitted violations.

The specific facts of this case, as set forth in detail by the district court, demonstrate precisely how such a jurisdictional bar would frustrate enforcement of the Act. All of the mitigating factors cited by Petitioner to excuse its admitted violations of the Act, Pet. Brief at pp. 4-6, p. 9 & p. 21 were thoroughly considered by the district court in determining the appropriate civil penalty. *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield, Ltd., supra,* 611 F.Supp. at 1556-65. The court found unpersuasive Gwaltney's attempts to "trivialize[] the seriousness of its fecal coliform violations," *id.* at 1560, it found that Gwaltney dealt with the known violations "in an exceedingly unconcerned manner" with an attitude that "borders on benign neglect," *id.* at 1561, and it increased the penalty because "Gwaltney's lackadaisical approach in correcting a problem that posed risks . . . to both human health and aquatic life should not be countenanced . . . ." *Id.*

Petitioner does not reiterate its many excuses for the admitted violations before this Court to suggest that the district court abused its discretion in fashioning a remedy. Instead, Petitioner asks this Court to bar the exercise of such discretion in all citizen actions where the violations have ceased by the time the complaint is filed. Petitioner, and others clever enough to await the filing of a citizen suit notice and cease violating the Act prior to the filing of the complaint, would escape punishment. The deterrent purposes of the Act and the integral role of citizen suits in abating pollution would be significantly undermined.

III. Conclusion

Therefore, the Court should affirm the judgment of the U.S. Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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